EXHIBIT 2

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

- x

In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a General Motors Corp., et al.

Debtors.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York 10004

February 17, 2015

9:02 AM

B E F O R E :

HON ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

Hearing re: Oral Argument on Motion to Enforce.

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning. Have seats, please. Well, I know everybody who's likely to speak. So, let me just get appearances of those who will be heard for the transcript. And then I want you all to sit down, because I'm going to have some preliminary comments.

MR. STEINBERG: Arthur Steinberg, from King & Spalding, on behalf of New General Motors.

THE COURT: All right, Mr. Steinberg. Could everybody hear me? I'm not sure if I have the same volume in my mic that I normally do. Can you hear me, Mr. Flaxer?

MR. FLAXER: (indiscernible)

THE COURT: Okay. Thank you.

MR. WEISFELNER: Good morning, Judge. Edward Weisfelner, Brown Rudnick, on behalf of the designated counsel.

THE COURT: Thank you, Mr. Weisfelner.

MR. WEINTRAUB: So, good morning, your Honor. William Weintraub with Goodwin Procter, also designated counsel.

THE COURT: Right, Mr. Weintraub.

MS. RUBIN: Morning, your Honor. I'm Lisa Rubin with Gibbs & Dunn on behalf of the GUC Trust.

THE COURT: Okay. She was kind of far from the mic; that was Ms. Rubin introducing herself for the GUC

Trust. I got it this time, Ms. Rubin.

MS. NEWMAN: Good morning, your Honor. Deborah Newman from Akin Gump on behalf of the participating note holders.

THE COURT: All right, Ms. Newman.

MR. ESSERMAN: Good morning, your Honor. Sander Esserman, Stutzman, Bromberg, Esserman & Plifka on behalf of designated counsel.

THE COURT: All right. And I see Mr. Flaxer right next to you, Mr. Esserman.

MR. FLAXER: Yes, your Honor, only to the extent that we feel that it's necessary to speak for -- it could be a minute or two would be it.

THE COURT: All right, very good. Thank you. All right, folks. With one exception, I want you to make your presentations as you see fit. But before you're done, I'd like you to address a fair number of questions that had occurred to me when I was reading the briefs. These questions (indiscernible) one or another of you, or, in many cases, both.

But first, the exception, mainly Mr. Weisfelner and Mr. Weintraub: you folks spend many, many pages in your briefs talking about the underlying failures of Old GM and New GM to institute the necessary recalls on the cars and the 24 or 25 people at Old GM who knew enough to justify

much, much larger recalls. I get it. But that's not what's before me now.

I'm prepared to assume, for the purposes of this controversy, unless Mr. Steinberg really wants to dispute it, that there was enough to require a recall well before June 2009, and that each of Old GM and New GM acted very badly in connection with the delay. But I want to focus on the legal issues. So, let's turn to them.

Starting with due process, Mr. Steinberg, one would assume, I think, that a company's books and records, if they're to determine whether a claim is known or unknown, have to be much more broadly construed than in the financial statement sense. And I take it that you're not arguing that whether or not a creditor is known or unknown turns on whether the company has booked the liability.

So, before you're done, I'd like you to tell me: how would you articulate the standard? I wonder whether the standard should be more than foreseeable but less than probable. But I would like you to put forward your view as to how I should construe that. It's debatable whether potential liabilities associated with the ignition switches were wholly (indiscernible) claims, even if Fritz Henderson and Mary Barra didn't know about them.

But I take it you'll agree that Old GM knew enough to send out recall notices back in 2009. Their people would

have known that there was something potentially wrong with their cars. And those who weren't in wrecks could have filed claims or objected, as they're doing now, at the time of the 363 sale. If recall notices had been issued, wouldn't the publication notice that was given then be more justifiable?

Number two: by the same token, Mr. Weisfelner, would you clarify your position on what notice should have been given? I gather the parties have stipulated that there were 70 million GM cars then on the road. I gather also that there were approximately 27 million whose cars, we're learning, later became the subject of pending recalls.

It'd be helpful if you would tell me how many of those 27 million cars were then subject to announced recalls and how many would have been subject to recalls if GM, which was then Old GM, of course, had announced them as it should have. Seemingly, the number would be very, very large.

Now, again, Mr. Weisfelner, is it your argument that mailings should have gone out to each owner, each of those 70 million, in the period between the June 1st, 2009, filing of the bankruptcy and the June 30, 2009, date for the start of the sale lien? Or, for that matter, the June 19 date, which was the deadline for objections in the 363 sale? Or are you saying it should have gone out by mail only to cars with the poorly designed ignition switches?

Both sides: what information do I have in the record on how much it would cost to send out mailing notices to all 70 million of the GM cars on the road at the time, or even 27 million cars? And what information do I have in the record on how much time it would take to send out 27 or 70 million notices?

Mr. Weisfelner, I made a factual finding back at the hearing on the same issue, that the continued availability of the financing Old GM was using to survive at the time was conditioned on approval of the 363 sale motion by July 10. And I also rejected an argument that was made by bondholders at the time that the government's July 10 deadline was just posturing and that I should have argued -- I should have found back then, or assumed back then, that the U.S. government cared so much about GM's survival that the U.S. government would never let GM die.

Well, that seems to have a lot of similarities to (indiscernible) you make now. On that, I know your clients weren't present back then to argue to the contrary, but to challenge -- or to challenge those findings. But others did. Are you challenging those findings now? Do you think there are some facts now to suggest that I should now find that the government was posturing, while you'd rejected that contention back in 2009?

I don't know if I'm going to hear from the GUC

Trust in the first phase of the arguments. But, at some point, Ms. Rubin, when you do get the chance to be heard, which you will sooner or later, I'd like you to help me with this: the cost of administration of the Chapter 11 case, which would at least seemingly include the cost of mailing, would come directly out of the pockets of your folks, the unsecured creditor constituency.

How do you think a judge should decide what's reasonable in sending out notice of a 363 sale to a universe of potential creditors when it comes out of the pockets of those who you know are creditors for absolutely, positively sure, like your bondholders, like your vendors in the supply chain, and victims of car wrecks, people who were actually in accidents who got injured or killed when cars didn't perform the way they were supposed to?

Back to you, Mr. Weisfelner: what would the notice have said, if GM were to do it right, and you say that GM didn't do it right? As I think it was Judge Bernstein said in Chrysler -- I think by then it had been named New Car Co., or maybe Old Car Co., "Things can go wrong with cars all the time. And, while design defects that can cause a loss in cars' value don't happen all the time, or all that often, I don't know if anybody could really say they're infrequent." So, what do you think would have been reasonable under the circumstances?

Both sides: is it appropriate to be making distinctions, when we're talking about honoring claims -- and I'm offering you a view now as to whether there are -- these are unknown claims as a (indiscernible) or not -- between liquidating 11s and 11s where there is a surviving entity, we all know that there's no discharge in a liquidating 11. There is, of course, a discharge in the 11 where a company survives.

A lot, and maybe most, of the case law (indiscernible) you rely on is in the context of expunging claims, either because they're late or because they've been discharged. But it's a lot easier to say that a claim isn't discharged when we have a debtor that's surviving and you can still go after that debtor by ignoring or blowing away the order that protected the debtor upon the confirmation of the case or otherwise.

Both sides: shouldn't we focus on the distinctions between the notice that's appropriate in a 363 sale on the one hand and the notice that's required to give parties a chance to file claims on the other? Or, to the extent that it's different, the notice that needs to be given before a judge discharges a creditor's claim? And isn't it necessary or appropriate to take into account the time exigencies inherent in many, perhaps most, 363 sales, especially those, like most of them, where the debtor only

has the cash to survive for only days or weeks?

If reasonableness depends on the facts and circumstances, as the Supreme Court said in (indiscernible), wouldn't it be appropriate to take into account that, in the 363 context, you have to hold a hearing on a sale in four weeks, because you're bleeding so badly that you can't survive any longer?

Mr. Steinberg: you point out that New GM didn't yet exist when notice was given, and that it was Old GM that was responsible for the failure to give the creditor community a notice. But does that matter? Or should a judge simply focus on whether or not the creditor was given appropriate notice, no matter who's responsible for it or for the failure to provide it, and then the extent to which the outcome would have been different if appropriate notice had been given?

Both Mr. Steinberg and Ms. Rubin, back to you. I haven't forgotten about you, Ms. Rubin. Let's assume that I agree with Mr. Steinberg that it wasn't practical to send out mailed notice to the 70 million or even 27 million car owners for the 19 days that they'd have to object to the 363 sale. But isn't it inexcusable for Old GM to have denied people whose cars were subject to recalls notice of the bar date for filing claims?

And even if Old GM thereto -- that is, in the bar

date context as in the 363 context -- wasn't going to give the 70 million or 27 million people mailed notice, I have some trouble seeing how they could have responded to the bar date notice and filed claims when Old GM still hadn't sent out the recall notices as of the bar date, when at least seemingly, if not apparently, there wasn't the same degree of urgency.

Now, both sides -- and here I mean Mr. Weisfelner and Mr. Steinberg -- on remedy, assuming I find violations of due process, I have problems with aspects of each of your positions. Mr. Weisfelner, let's turn first to what you're asking for. I gather -- and I think you said it expressly -- that you're not asking me to vacate the entire sale order. In fact, I gather that you aren't even asking me to vacate it, even in part.

It seems to me that you're saying, "Fine, enforce it against everyone else. Just don't enforce it against me, or me and my guys." Is that an unfair characterization of your position?

Both sides: finding a due process violation may not by itself require a showing of prejudice. But isn't the prejudice critical to determining whether there's a remedy for it? I'm inclined to agree with Mr. Weisfelner that finding a due process violation does not by itself turn on prejudice, but it seems to me that the remedy for it

necessarily must. The issue, it seems to me, is: what should a Court do about the situation when it finds that there's been a violation of due process?

And here, I'm going to ask you guys to address when the standards are the same when you have a bipolar dispute, or a modestly polar dispute, which is typical in a (indiscernible) litigation, and when you have a case where hundreds, thousands, or millions of creditors are affected by an order, and a very small subset of the universe of people who were affected by the order want that order blown away or ignored.

Mr. Weisfelner, you said in your brief that due process involves the right to be heard, not the right to win. And because you were denied the right to be heard, it seems to me that you're saying you (indiscernible) the right to win. Let's go with that for a minute.

If you (indiscernible) the right to be heard, wouldn't the appropriate remedy be a do-over, to give you a chance to make the arguments that you didn't get to make the first time, and then to look at the matter ab initio to see whether the result should be the same or should be different? Because it seems to me that what you're asking for, assuming that you're (indiscernible) due process and you've heard my questions that suggest that -- and I have concerns as to whether you guys were denied due process --

you're asking to simply win.

Is it speculation or is it totally obvious for me to say now that I wouldn't have denied permission for GM to survive and to conduct its 363 sale so that one group of litigants could get a leg up over another group of litigants? Or I guess I should say one group of creditors should -- could get a leg up on other creditors.

And why in the world would I decide the successive liability issue differently today than I did after talking about it for five or 10 or 15 pages in my first opinion, when I considered the arguments made by people like Mr. Jack (indiscernible), who argued the exact same things that you're arguing now after they had (indiscernible) given the appropriate notice?

So, what I need you to do, Mr. Weisfelner, is tell me that, if you had been given notice and an opportunity to be heard back in 2009, how would things be different? Are you arguing to me that I would have denied permission for the sale, or that I would have granted a free-and-clear order generally but I would have denied it for your favored group?

Or do I properly read from your brief that you would have wanted me to give the sale some kind of conditional approval for your benefit, saying I'd approve it if, but only if, New GM were required to assume your claims?

And then, if that's your position, would you please tell me whether there would be some reason for me to grant that protection for people who were claiming that their cars were worthless or that they were inconvenienced, when I denied that relief for people who were injured or killed in actual wrecks?

Also, Mr. Weisfelner, let's talk about the exact context of 363 sales, and recognize, as I think we need to, that 363 sales are an extraordinarily important part of the bankruptcy (indiscernible), not just in this case but winning in the other 11s, and that whatever I do, for better or worse, is likely to have precedential effect.

How can a judge force a buyer of assets in a 363 sale to assume liabilities that it doesn't want to assume? Isn't the only real remedy to deny authority for the sale totally, or to say, were I the judge back in 2009, that, "Yeah, the sale can take place, but I, the judge, won't grant a free-and-clear order at all"?

And, if that is the choice that's provided to the judge, how helpful is that to the remainder of the creditor community, the thousands of people that Ms. Rubin represents? And do we want to impose a principle of law that requires judges to frag everyone else with the same grenade?

Mr. Steinberg, despite the reservations that I

just had expressed, I have some in your direction as well. Before I read the briefs and the underlying cases, I'd started with (indiscernible) stint in bankruptcy, orders and agreements rise and fall as a whole, and that you can't enforce them in part and disregard them in part, or cherry-pick the parts that you like and those that you don't, or, as here, say they're enforceable against most of the world but not against this or that favored class.

But your opponents have cited five cases that seem to do exactly that. Three, while they come out of lower courts, one Bankruptcy, two District, involve 363 sales. The other two don't involve 363 sales, but they come from the Second Circuit. And, while one of the Second Circuit cases is only a summary order, which therefore isn't a binding precedent, it's still a Circuit -- Second Circuit opinion. And, frankly, I don't like to disregard anything that comes out of the Second Circuit, that the Second Circuit tells me.

So, Mr. Steinberg, I need you to talk about Metzger, the 2006 decision by Arthur Weissbrodt, a bankruptcy judge in San Jose; (indiscernible), the 2007 decision by District Judge Mary Cooper in Trenton; and (indiscernible), the 2009 decision by Senior District Judge John Grady in Chicago.

And I need you to talk about the Circuit's 2010

decision in Johns Manville, Travelers v. Chubb, which I think is sometimes referred to -- I believe this is Manville 4; and its 2014 decision in Koepp, K-O-E-P-P, the summary order from a panel that included Judge -- Chief Judge Katzmann and Judges Livingston and Hall.

Finally, while it may be trumped by the holdings of those five cases that I talked about, I still need some help on whether I should be looking at this in (indiscernible) of 9024 and 60(b) terms, or whether I should just bypass what those rules say and get to the "You're excused from the order or not" kind of (indiscernible) those other decisions did.

But I still want both sides to address whether a judge has to look at it in traditional 60(b) terms and either knock it out or live with it, or the third option, which may or may not be permissible under 60(b) doctrine, of living with it in part and validating it in part.

Mr. Weisfelner, you can help me by confirming, if it's true, that you're saying I shouldn't be thinking about invalidating the (indiscernible) or validating the rule but simply refusing to enforce it. But, if that is in fact your position, then help me understand how I can be deciding this without regard to a (indiscernible) bankruptcy procedure in lieu of federal civil procedure. And that would at least seemingly be telling me how I'm supposed to do my job.

Finally, folks, in many ways this is the most important of all the things that I want you to talk about, because I think it's the closest question, in an environment where there are already a bunch of close questions. If we had a do-over, and it's my instinct that, when somebody is denied due process, he or she is entitled to a do-over, the result of part of what you guys are arguing would be pretty clear. But part would be highly debatable. And, in each of those two sides, or prongs, one side would have the stronger side and one would have the weaker.

If we had a do-over, I think it's quite clear that I'd still grant a free-and-clear order, especially since I heard the same arguments before and I rejected them. And I gave them a lot of thought before I did. But if we had a do-over, I'd likely have to consider whether a free-and-clear order in the form that I just issued it was over-broad. And, in this respect, the economic loss plaintiffs, though not Mr. Weintraub's guys, would have the upper hand.

This order, as I read it, not only blocks successor liability, but also blocks claims based on wholly post-sale events that involved Old GM or Old GM parts. This is one of the issues, if not the issue, that bothers me the most. And the issue is whether what I should have done, or would have done if the argument had been made to me then, was to add a new order that was narrower and said that

people couldn't sue based on anything Old GM had done, but they could sue if it was based on what New GM had done, so long as Old -- as New GM wasn't blamed for Old GM's acts.

And if, as I'm inclined to rule, I find that, if there was a due process violation, the economic loss plaintiffs would be entitled to a do-over, and if I also concluded, as I'm inclined to do, that, if they got a do-over on successor liability, the result would be the same, the issue or the conclusion I'd reach would have been different, given New GM protection for events that it did that were not premised on anything old GM had done. And I need both sides to address that scenario.

I have only one real question in (indiscernible), so, even though we may not get to it this afternoon, I'm going to get it out anyway. Mr. Weisfelner, is there a reason that you didn't ask me to stay further distributions to Ms. Rubin's guys, the Old GM creditors, until the issues before me now were sorted out? Am I right in assuming, since you're a pretty competent lawyer, that you didn't overlook that possibility?

And can I properly assume that you did it for tactical reasons, because you'd rather get $100 in a recovery against New GM, as contrasted to the $0.25 or so that you'd get on the dollar if you had to go against Old GM (indiscernible)?

Now, with all of that, let's get to work. And (indiscernible) we hear first from you, Mr. Steinberg?

MR. STEINBERG: Yes, your Honor.

THE COURT: Come up to the main lectern, please.

MR. STEINBERG: Your Honor, good morning. I'm Arthur Steinberg, for the record. I'm here with my colleague, Scott Davidson, and my co-counsel from Kirkland & Ellis, Richard Godfrey and Andrew Bloomer. I want to thank your Honor first of all for accommodating all the lawyers for the rescheduling of this conference.

And I'm sure, like my other counsel who will be addressing you today, they're all -- they have a lot of thoughts swirling in their mind as they try to address the multitude of questions that your Honor just went through. But I think I will be able to do it, and I will do it in the order where it was presented itself in the outline.

About a year ago, New GM announced a recall with respect to ignition switches in Old GM vehicles. And shortly thereafter, that started a wave of lawsuits that were commenced against New General Motors, seeking purported economic losses regarding vehicles that were subject to the recall.

In the early complaints that were filed, which sought primarily monetary compensation for the alleged decrease in value of the vehicles based on the ignition

switch that was being repaired, these complaints referred to Old GM and New GM interchangeably. They used the words "successor liability," and they pled causes of action which, under the sale agreement, were specifically identified as retained liabilities.

And once we filed a motion to enforce, the later filed complaints tried to sidestep the sale order by, among other things, avoiding phrases such as "successor liability." But even these more carefully crafted complaints could not alter the underlying act that their claims related to Old GM vehicles and parts sold and old GM conduct. And their pled causes of action were the same retained liabilities of Old GM.

And during the summer of 2014, there were other recalls that New GM announced that were unrelated to the ignition switch recall, and that led to additional economic loss complaints being filed against New General Motors, which caused New GM to file a separate motion to enforce for these actions.

And eventually, most of these causes of actions relating to economic loss, and even the accident cases, were consolidated before in an MDL before Judge Furman. And lead counsel was selected in the MDL, and they filed two complaints, which were intended to subsume the economic loss complaints that had been filed against New General Motors.

And the parties referred to that as the presale consolidated complaint and the post-sale consolidated complaint.

And while these events were taking place, certain presale accident plaintiffs also brought lawsuits against New GM. And New GM retained Ken Feinberg to develop a program to compensate, on a voluntary basis, both the presale and the post-sale action and plaintiffs who had the recalled ignition switch in their vehicle and had met the eligibility criteria of the Feinberg program.

And, for those who could not or chose not to participate in the Feinberg program, New GM believed that the actions violated the sale order, since claims based on presale accidents were retained liabilities under Section 2.3(b)9 of the sale agreement. So, a separate motion to enforce was brought to bar those claims as well.

And, in response to these motions to enforce, your Honor held periodic status conferences where the plaintiffs raised, among other thing, the Rule 60 due -- 60(b) due process issues relating to the notice of the sale motion.

Then, in an effort to efficiently try to resolve these issues, the parties, at the Court's urgings, agreed to factual stipulations. And then they identified certain threshold issues that the Court might summarily decide. And substantially all of the plaintiffs entered into stay stipulations so that your Honor could decide those threshold

issues.

And so, in the first phase of the oral argument, I'll deal with the three threshold issues that we've identified, which are the due process issues, the remedies issue, and the Old GM claim threshold issue. And then the other threshold issue that had been identified, the equitable mootness issue, will be discussed at a later point this afternoon.

Now, the central event that underlies all of these motions to enforce is the 2009 purchase by New General Motors of substantially all the assets of Old General Motors in a bankruptcy-approved 363 sale. And the sale was structured so that New GM, at the time a U.S. government-sponsored entity, would not be liable for most of Old GM's liabilities, except for specifically defined assumed liabilities.

Importantly, the liabilities that are the subject of the motions to enforce are not assumed liabilities. They're all retained liabilities of Old General Motors. The three -- and the assumed liabilities are the glove box warranty, the lemon law claim, and the post-sale accident (indiscernible) claims.

THE COURT: Pause, please, Mr. Steinberg, because I'll let you talk about that if you want. But maybe I should have said this more explicitly: I'm quite

comfortable with the fact that all or substantially all of the claims that had been brought against New GM were not assumed liabilities and are blocked or proscribed by the sale order.

But it seems to me that your opponent's position is more like what we called in Freshman Civil Procedure "confession and avoidance." They say, "Yeah, we know that they're blocked by the sale order. But you should be ignoring the sale order."

So, if you want to -- I also think this is largely relevant to the third of the threshold issues, because I think -- I'll hear from Mr. Weisfelner if he feels differently -- they've conceded that they're covered by the civil letter, but they say I shouldn't be enforcing it. So, if you want to keep talking about what the sale order and the underlying sale agreements say, go ahead and do that. But I think we're probably beyond that at this point.

MR. STEINBERG: Appreciate that, your Honor. And I agree that we are beyond it. I just wanted to make the general point that we are now talking about what is defined as the assumed liabilities under the sale agreement. I recognize that they have an issue with what we call the used car purchases, which are in their post-sale consolidated complaint. And I'll talk about that when I talk about the Old GM claim threshold issue.

And, as your Honor had said, and obviously that you know, the 363 sale was approved after extensive notice was given, pursuant to the Court-approved procedures. A multitude of objections were filed based on the sale notice given and the widespread media coverage that related to the sale. And then your Honor conducted a three-day trial. And the Court then rendered a very extensive sale decision and a lengthy and fully-vetted sale order.

Now, your -- as one of your questions that your Honor answered, which was, "How do you sort of calculate the direct mail notice given? Where is the thing in the record that says that?" the Garden City Company filed a fee application -- a retention application. The retention application actually described what it would cost for each mail notice that it would send out, the cost of the assembling of the package and the cost of the postage.

So, when we extrapolated as to what the cost was for sending out four million notices by direct mail, which we said was $3 million, we then extrapolated, using the same formula in the Garden City Company application, and said that, if you had to send out direct mail notice for 70 million people, it would cost $43 million. So, that's the point in the record that talks about that.

In the sale order, among other things, New GM was --

THE COURT: Pause, please. Is that 43 million bucks for all GM car owners? Or is that for the lower -- somewhat lower number subject to the ignition switches, the 27 million or thereabouts?

MR. STEINBERG: The $43 million number is predicated off of 70 million domestic cars in the United States.

In the sale order, your Honor found that New GM was a good-faith purchaser for value, and it would not have any successor liability for Old GM's debt. And, importantly, the no-successor-liability finding that your Honor gave reserved condition for the sale going forward, that New General Motors would not have gone forward without the successor liability finding. And that's in, I think, paragraph DD of the -- of sale order.

The primary purpose of the 363 sale hearing -- and I think a lot of your Honor's questions were directed at this -- it was not to quantify the amount of the retained liabilities. It was to determine what was the highest and best bid for the assets.

That issue, the allocation of the sale proceeds and the quantification of the liabilities, were for later phases of the bankruptcy case: the filing of the schedules, the setting of the bar date, the filing of a disclosure statement, the filing of a plan. All of those actions were

post-sale. They were done by Old General Motors. And they had nothing to do with New General Motors and they had nothing to do with the Section 363 sale.

The -- and I think that that's significant because so much of the briefing that was done in this case by my opponents is directed on the fact -- and the cases that they rely on are bar date cases, where you have the extinguishment of a claim if you don't timely file it. And therefore, a lot of the cases there talk about sort of the "all or nothing" proposition.

Also, the person who is giving the bar date notice is the person suffering the consequences if they didn't give the notice properly, so that, if the Old GM estate should have given a broader notice than they did, then someone who comes in and says, "I should have gotten broader notice, and therefore I should be able to participate in the estate," well, the person who created the problem by not giving the proper notice is the person who has to incur the remedy. That's a totally different situation than a Section 363 transaction, especially because you're dealing with the third party here, the third party being the good faith purchaser for value.

And, in the Edwards case, which we cite in our papers, it is --

THE COURT: That's the Posner opinion, then, of

the Second Circuit?

MR. STEINBERG: That's correct. The -- and I know it engendered some criticism on certain facts from my opponents as they try to distinguish it. But the central issue there that I think is critical for your Honor to consider, and underlies some of your questions that you asked, was that they said that due process issues need to dovetail with the concepts of a bona fide purchaser for value, that there are times when there could have been a due process issue that was involved. But when you're dealing with a bona fide purchaser for value, the question is whether that remedy should be asserted against that party.

And the same issue is involved when Courts look at Rule 60(b) and upsetting a sale order by virtue of the fact that there wasn't due process given. The test that they offer is a three-prong test: exceptional circumstances that the party has to show; timeliness, timeliness of the application; and undue prejudice to -- whether there was undue prejudice to the -- any party. If there was an undue prejudice to a party, then you would not be able to get Rule 60(b) relief. That is an essential element to be able to try to get it in order to establish a basis to vacate an order on due process.

And when you're dealing with a sale agreement, and the party -- one of the parties is a bona fide purchaser for

value who would not have closed the transaction without a finding that there was no successor liability, you can't vacate that order. You can't partially revoke the order; you can't ignore the order without ignore -- without finding, at the same time, that there was an undue prejudice to the party, an undue prejudice to be exposed to potentially what they've asserted to be billions of dollars of claims.

So, all of that ties in together as to why a 363 order is much different than a bar date circumstance. And I'll get to dealing with the cases that your Honor asked for me to comment about relating to sale agreements, because there the situation was that the sale agreement itself was either overly broad because the debtor could not have sold the asset or didn't provide for selling of the asset, and that's why the Court was carving out the sale remedy. It wasn't because of a due process concern where they're trying to allow one person to avoid what was a foundational element of the sale order itself.

So, when your Honor had your finding and dealt with the sale order issues, you were looking at things that related to whether this was -- whether the assets should have been sold and whether this was the best price under the circumstances.

And your Honor's questions were exactly correct

about the differences between a sale agreement and a claims bar order position, in that, when you're moving for a 363 sale, many times you're dealing with a melting ice cube situation. You're dealing with a circumstance where the assets are eroding. Delays are potentially destroying value. And, in this particular case, your Honor had to deal with deadlines that had been set by the purchaser, New General Motors, as to when the sale order had to be issued. And, if the sale order wasn't issued --

THE COURT: But back at that time, were we really talking about the order to enforce?

MR. STEINBERG: That was correct, your Honor.

THE COURT: And Auto Task Force, at some point before the closing, caused New GM to be formed, if I'm not mistaken.

MR. STEINBERG: That's correct, your Honor.

THE COURT: Yeah.

MR. STEINBERG: This is the -- when we talk about New General Motors at the time you're dealing with the sale, we're dealing with the -- essentially the Auto Task Force, the people from the U.S. Treasury. Those were the people making those type of decisions. Those were the people who testified before your Honor at the sale hearing.

Those were the people who said, when asked at the sale hearing, "Why don't you just do assume the presale

accident claims; they're not that much; it won't destroy the enterprise if you do that," and they drew their line in the sand. They said, "I'm only going to take what's commercially necessary. I'm not taking this." And that was it. That was it. That was the choice that your Honor had to make: either accept this deal based on how the purchaser had formulated it, or reject the deal.

And your Honor recognized that in the sale decision, when you said that it was for the purchaser to decide which of the prepetition liabilities it was prepared to assume. It was their business judgment of what they wanted to do or not do. And you would either accept the deal or not accept the deal. But you couldn't tell the purchaser, "You have to take these liabilities in addition."

So, with regard to the presale accident claims, they actually tried to show at the sale hearing that they weren't that much. They went through Aon report to try to show that, if you back out the post-sale accident claims that are part of the reserves, then it may be not that much.

And I think Mr. Miller, on behalf of Old GM, when he was the proponent, started to say, "A little here, a little here, a little here, a little here, and all of a sudden you have a purchaser saddled with the same type of issues that Old GM had and that the government wasn't prepared to, in effect, start an enterprise with those --

that kind of burden."

So, you have a situation when you have a bar date where you have a melting ice cube. You clearly have more time to deal with the claim issue. And you have the additional circumstances that, if the person who is moving for the bar date blew it, then that's the party who should suffer the consequences. It's different than when you have a 363 sale.

And I will talk shortly about why that I don't think there was a due process violation at all --

THE COURT: Pause, please. That's the second time you can say that. But can you understand, from a judge's point of view, that he or she, if somebody blew it, as you put it, cares more about that which is necessary to fix the problem than who was responsible for the problem in the first place?

MR. STEINBERG: I understand that, your Honor. But if I was to -- if you had taken my comments to say that I thought that they blew it, I don't think that they did blow it. I think that the publication notice was appropriate.

THE COURT: Of the bar date as well?

MR. STEINBERG: Yes, your Honor. But that's not my fight. That's someone else's fight. I do think that that was the situation. And I think that's consistent with

the case law. And I'll talk about that.

But I do think that the issue of who is impacted on the remedy is relevant if there's a due process violation. And your Honor has the Edwards situation that they talked abut, which is that -- assume for the moment that you had two innocents here, you had the person who should have gotten notice who didn't get notice, and you have the bona fide purchaser for value who actually closed the transaction predicated on the facts that your Honor approved.

In the battle between a bona fide purchaser and that person who claims not to have had -- gotten proper notice, the Edwards case said that you side on behalf of the bona fide purchaser. That is the person who wins. And then you're circumscribed as to what the remedy might be, but the remedy will be based on that circumstance, because of the bankruptcy policy objectives of a 363 sale of achieving finality, of achieving certainty, and achieving the best price for the estate. And those items don't override due process, but they help shape due process.

And those objectives, those things that you're talking about now, about those bankruptcy policy objectives, they're actually the elements of Rule 60(b) test, and they're actually the elements of the 363(m) test. In a Section 363(m) test, they say that, if you're dealing with a

good faith purchaser for value, and there's no stay of the sale order, then the purchaser takes free of that circumstance. And you --

THE COURT: Pause, please, here, Mr. Steinberg, because, on this one, I wonder whether you're on weaker ground. Mr. Weisfelner, in his brief -- maybe other people said it too -- said 363(m) applies to appeals. We live in an environment where the Supreme Court believes sometimes, or in the view of some, even to an extreme -- you know, we live in a world of plain meaning and textual analysis. Do I have the right to apply 363(m) to a situation other than an appeal?

MR. STEINBERG: No. No, but I don't think you -- I think the point that I was trying to make is that the policy objectives of Section 363(m), what they're trying to accomplish, the policy objectives of the Rule 60(b) test, about an undue prejudice to a third party, they're all relevant of those policy objectives as to how your Honor should approach the problem.

All I was trying to do was saying that the rationale for 363(m) is consistent with what I'm saying before, not that you should be applying a 363(m) test. The rationale of 363(m) is the bona fide purchaser concept, which I that, if you close the transaction and you were a good faith purchaser, and you were not otherwise stayed,

then you take, free and clear, whatever comes up after that. You're protected.

Rule 60(b), on the -- vacating a Rule 60(b) order on due process grounds has the same thing. It's done not in the language of 363(m). It's done in the context of that third prong, undue prejudice to a third party. When you have an undue prejudice to a third party, by taking away the asset after you've just paid for the asset, or undermining the fundamental aspect of the deal, the Court is saying you can't do that. You should be able to address due process grounds, but there are constraints of what you should be able to do and not be able to do.

And that takes me back to the Edwards case, which is where Judge Posner was actually saying the same thing again in different words, which is that, when dealing with a sale and dealing with the fact that you have someone raising issues, when you have a bona fide purchaser, the bona fide purchasers are, in effect -- are the thing that you need to focus on. And they actually win in a battle of that type of dispute because of those bankruptcy policy objectives.

The Court -- all of these issues are sort of tied together on the same concept, which is that a 363 sale has certain fundamental objectives, and that, once a sale closes to a good faith purchaser, then we're going to protect the purchaser. And whether you do it under 363(m), whether

you're doing it under 60(b), whether you're doing it just as straight as Judge Posner had done it in the Edwards case, it's the same concept.

And I think that affects the remedies issue and it actually affects whether there was a due process violation. And I do want to talk a little about why I believe that there was no due process violation, not because of the notice circumstance, but because I don't think that there was a property right that was extinguished by the sale. And there's five reasons why that's the case.

The first one is endemic to a 363 sale. 363 sales do not, in most cases, extinguish rights. They say, "I'm selling, free and clear, liens, encumbrances, and interest," which the case law includes claims, and say that it attaches to the proceeds of sale. So, there's no extinguishment of a claim.

Now, there are cases where there actually is an extinguished, where, if I'm selling it free and clear of a covenant that runs with the land, then there's not a great remedy that you can have by saying you should attach to the proceeds of sale. And that's some of the cases that the designated counsel cites in their papers.

But when the lawsuit is monetary damages, which is what their lawsuits are, then, whatever their claims are, it attaches to the proceeds of sale. There is no

extinguishment. It's another fundamental reason why this is different than the bar date, because of that.

So, the first thing you have is that there's no extinguishment in a 363 sale, whatever rights they have, whatever they think they had, that attach to the proceeds of sale. And they had the right, right after the sale, to assert whatever claim they had in the case. The bar date hadn't been set; the schedules hadn't been set. Whatever it was, they had the ability to do that.

And the Macarthur v. Manville case, which we cite in our paper, says that the underlying principle of preserving a debtor's estate for the creditors and funneling claims into one proceeding in the Bankruptcy Court is a fundamental part of the bankruptcy law.

They actually have the same concept in the adequate protection sections of the Bankruptcy Code, which is you're selling free and clear of someone's property interest, but you're giving them replacement collateral; you're giving them the proceeds of the collateral; you're not destroying a property interest. You're shifting it. And that's fundamentally what happens in a 363(f) sale.

And this point was made at the sale hearing. It was made by Old GM's counsel at the closing argument. It was actually made by Wilmington Trust counsel as well, at the closing argument, as well, too. And your Honor actually

had echoed this theme in your decision, when you said, "The sale agreement does not dictate the terms of a plan of reorganization, and it does not attempt to dictate or restructure the rights of the creditors of the estate. It merely brings in value. Creditors will thereafter share in that value pursuant to a Chapter 11 plan of reorganization."

And that same point was made by Judge Gonzalez in the Wolff case. I think it was Judge Gonzalez. And we cite that in our papers as well, too, the Wolff opinion, which is a contested matter that came up after the Chrysler decision and sale order was entered. And there, Judge said, "The purpose of the sale was not to effect a plan of reorganization and set distributions to classes of claimants, but to maximize the value of the estate and support the best possible recoveries under a separately confirmed plan."

So, the first fundamental point is that there was no property right that was extinguished. It's not like a bar date case where, if you don't file your claim timely. It's not like a plan case where you have a discharge. In a sale, the claim shifts to the proceeds of sale.

Second point is to why there was no property right that was extinguished as part of it. And this really relates to the Third Circuit decision in Emoral. And --

THE COURT: Which Third Circuit decision?

MR. STEINBERG: The Third Circuit decision in Emoral, E-M-O-R-A-L. There, the Bankruptcy Court said that, in the context of the successor liability claim -- and here we are talking about they claimed that the sale was free and clear of their successor liability rights. There's no other property right that they were asserting, other than the right that they think they have under successor liability.

Court says that, once a bankruptcy occurs, the ability to assert a successful liability claim is an estate cause of action under Section 544 of the Bankruptcy Code. It's the same right that every creditor could have asserted, and therefore the estate fiduciary is the one who could bring that claim, not any individual.

THE COURT: I have a little problem with that, Mr. Steinberg, because, when we give the estate rights that are owned by creditors before the bankruptcy, we do it by express statutory means such as Section 544 of the Code. The ability to assert a successor liability claim, when it's permissible, is to add a class of defendants that the creditor can sue beyond the original assignor of the property. It gives the creditor a second target, if you will. Isn't that a benefit of the creditor rather than the original target?

MR. STEINBERG: I don't think so, your Honor, for the following reasons. One is that the creditors didn't

have a successor liability claim until the sale actually consummated. There was no claim they had against New General Motors. They had no claim if the 363 sale didn't go through. As of the time of the bankruptcy case, they had no successor liability claim against anybody. They had no property right as against anybody.

I mean, successor liability is not the same thing as a property right. It's a claim that someone acquires as a sort of an equitable remedy because there's nobody that you -- because either of the structure of the transaction or because there's nobody else that you could sue. Neither of those circumstances apply in these circumstances. The --

THE COURT: Stick with me for a second, because there is something related to what I just said but that's slightly different as well. Creditor wants to assert a successor liability claim. It wants to go after an entity with the potential to go after 100-cent dollars instead of baby bankruptcy dollars.

That has the effect, for that subclass of the creditor community who can sue for 100-cent dollars, of giving that creditor group a leg up over the poor suckers in the creditor community who can only get baby bankruptcy dollars. Once again, that seems to me a benefit for a favored creditor rather than a right of the estate.

MR. STEINBERG: Yes, but I think, your Honor --

and I think I understand what is troubling you about that, and I think I could isolate it for you. The general concepts of successor liability are generally (indiscernible). There's legal successor, which is a claim that everybody shares. Transaction is structured (indiscernible), and so that the purchaser is the new legal successor of the seller.

De facto merger, continuation of business, or fraudulent purpose in connection with doing the transaction altogether: those are the four general prongs or successor liability. In the product area, in certain states, there's a product line exception. And I think your Honor is thinking a little about the product line exception. And I'll separately address the product line exception.

But, with respect to the four prongs, de facto merger, legal successor, continuation of business, and fraudulent purpose, all of those things are something that every creditor has, not one creditor, every creditor. The plaintiffs here are in no better position than the bondholder or anybody else to have been able to assert those claims.

And that is why Emoral, I think, was correctly decided. And that is why Emoral relied on the Keene Corporation case, which was 164 B.R. 844, a Bankruptcy Court case in the Southern District of New York. And it basically

said that successor liability claims are estate causes of action.

And that is why Judge Lifland's decision in Alper Holdings, which is 386 B.R. 441, said the same thing. Those type of successor liability claims, based on the structure of the transaction, those are things that are estate causes of action. The estate representative is the one in charge to bring it. And, in the context of the 363 sale, the estate representative is the one who could release it.

Third reason why I don't think there was a property interest -- and this is actually in your Honor's decision, and it doesn't say it explicitly, and I don't want to put words that says that you tried to say something explicitly, but you clearly had the concept in your mind. In Footnote 99 of your decision, you said that, in discussing successor liability, you said, "The Court notes that, as a matter of federal bankruptcy law, Section 363(f) of the Bankruptcy Code trumps state law and requires a different result."

And so, it would have been nicer if you'd said federal preemption. You didn't use those words, and I don't mean to try to say that that's exactly what you tried to say. But those are -- that is the concept, which is that, when you're -- because of the bankruptcy policy objectives, and the federal bankruptcy law, of trying to achieve returns

on assets, that that has a tendency to trump state law.

And, in the White Motor case, the Bankruptcy Court for the Northern District of Ohio, they said that effects of successor liability in the context of a corporate reorganization preclude its imposition. The negative effect on sales would only benefit product liability claimants, thereby subverting the specific statutory priorities established by the Bankruptcy Code.

So, there, he was more -- the judge was more specific in saying that there was a federal preemption concept. But even if you don't want to go that far, your Honor was recognizing in your sale decision, in trying to justify why you were making your ruling on successor liability, that there were concepts about the Bankruptcy Code, Section 363 sales, that trump state law in connection with successor liability. And I think that that is true. And I think that the case law recognizes that. And some judges have said it more explicitly than what your Honor was alluding to.

The fourth reason why I don't think that there was a property right that was extinguished here is that your Honor decided, as a matter of fact and law, that there was no successor liability claim. The four-prong test, the most important factor on the four-prong test -- and this is undisputed -- is that there was no continuity of ownership

between the purchaser and the seller. New General Motors was going to be owned primarily by the government. The shareholders of the seller were going to be wiped out. There's no continuity of ownership.

If you don't have continuity of ownership, you don't have de facto merger as a matter of law, you don't have legal successor. Your Honor found, as a matter of law, that this sale was not of a fraudulent purpose. That wipes out the other element.

And, on the continuity of the business section, in the Second Circuit decision of Douglas v. Stamco, which is a 2010 Second Circuit opinion, they actually talked about that provision. And they said, if the seller survives, even in the context of a liquidating trust, if it survives, then you -- then the continuity of ownership factor is not established. You don't have successor liability on that basis.

And that's what happened here. I mean, Old GM survived. Old GM is still -- well, we argue; GUC Trust can disagree -- its successor is the GUC Trust. But certainly it survived until almost -- until two years after the transaction. So, there is no of those four elements, as a matter of fact, that would have established successor liability, which then takes me to the fifth point, which is the product line exception, which is true in only certain

states.

And, if it wasn't federally preempted, and if it wasn't in an estate cause of action, and if you were concerned about the claim was going to be extinguished because of the 363(f) concept, even though I don't think that that's true, then you have to see -- do an economic loss plaintiff, do they have any claim under the product line exception? And the answer is no. We have not been able to find a case; they have not cited a case. The product line exception doesn't apply to them.

Whatever the state law was, whatever rights these state laws are trying to protect, it's not protecting economic loss plaintiffs. It's also not protecting presale accident plaintiffs. The purpose of the product line exception is that, after you have a sale, and you've had an accident, and there's nobody to go after, the Court is saying, "I'm going to make the successor potentially liable," in certain states, not a lot of states, a minority of states.

That's not what happened here. Because the post-sale accident paradigm was actually assumed by New General Motors, it took away the successor liability issue on the product line exception.

And that is why, when someone asks me, "Why did your Honor carve out in your decision about successor

liability to the extent Constitutionally permissible for the asbestos plaintiffs -- why weren't you broader? Why did you limit to the asbestos plaintiffs only?" and I wasn't sure what the answer was. But I did know that, vis-à-vis the product people, that exception didn't apply anymore. That concern of future creditors didn't apply anymore, because the sale agreement had that as an assumed liability of New General Motors.

So, the threshold issue of the threshold issue of due process was: was there a property right extinguished? And I've told you why, your Honor, there were the five separate reasons why there was no property right extinguished, and therefore you don't have to get to all the other issues that are embedded here.

The next thing I'd like to talk about is the burden of proof. I think, when this case started, I kept on hearing Rule 60(b). And, when you read the briefs that were filed in this case in response to our brief, there's no real mention of Rule 60(b) anymore. They want to make -- they want to say that I'm entitled to this relief but I'm not working under Rule 60(b).

And I think the reason why is what I articulated before, which is that they don't have a case under Rule 60(b), because Rule 60(b) requires them to show that there would not be an undue hardship on a party. And you can't do

that with a bona fide purchaser for value.

And that concept of how 363 sales, burden of proof, bankruptcy policy objectives -- I think Judge Peck was trying to deal with that in the Lehman case, when he said that there was something about it that he thought that the burden of proof, in connection with 363 sales, is even higher than in other circumstances, because of that.

And in the Lehman case, he was looking at whether the actual fundamental aspect of the sale -- whether an asset had been properly disclosed to him was appropriate. And even there, he said that he was not going to upset the sale, even if he thought there should have been better disclosure on the actual assets that were being transferred.

That's a much harder case than what's been presented to your Honor, where there's no issue about what the assets were that were being sold. The issue is whether there was a proper description of retained liabilities in the context of a sale which was not trying to extinguish retained liabilities. A hearing where the purpose was not to deal with retained liabilities; those issues were for another day. And therefore, I think that's what the judge was trying to deal with Lehman.

The issue that your Honor had raised in one of your questions, which is, "Can I just carve them out of the sale order, and leave the sale order in place, but just

carve them out?" I know your Honor has written and spoken many times, and sometimes I'm on the right end of this and sometimes I'm on the wrong end of this, but your Honor talks about stare decisis, the ability -- the need to follow the law of the circuit, and that that guides how you render these decisions.

And I would just point out to your Honor that the argument about "carve me out of the sale order" was actually made on appeal of your Honor's decision. It was in the Campbell case. And it was actually the presale --

THE COURT: That's the one before Judge Buchwald.

MR. STEINBERG: Yes. It was actually the presale plaintiffs. They said, basically, to the judge, "I want you to apply the sale order to everyone but me. And then you could approve the order." And then the judge used terms like "elective surgery," "knock the props out from the transaction," and said, "I can't do that. And even the Bankruptcy Court couldn't do that. The bankruptcy order talked about this was an integrated transaction. Every term is dependent on every other term. I can't blue-line the order."

And even if there was a peripheral thing that you could blue-line and ignore the provision of the order, successor liability was not a small item here. That was a fundamental, foundational point that you just can't ignore.

THE COURT: Pause, please, Mr. Steinberg. You're ahead on successor liability. But your opponents' stronger position is on matters that were not raised by Campbell. Campbell is Mr. Jakubowski's guys, if I recall.

MR. STEINBERG: Right.

THE COURT: There were 12 litigants who were in real, genuine car wrecks who wanted to sue New GM, along with Old GM. Judge Buchwald, like me, didn't address the more debatable aspect of the sale order, which was protecting New GM from its own wrongful conduct. Now, should I regard her principles as a pawn to an argument that was never made before either her or to me?

MR. STEINBERG: No, but, your Honor, I think -- I'm glad that you raised that point again, because I will try to now answer your question, because, fundamentally, underlying your question is something that I disagree with.

Let me start with the proposition that I agree with you. I think, if New GM had an independent duty in conduct vis-à-vis anything -- and clearly it assumed liabilities, right? So, it assumed the glove box warranty; it assumed the lemon law; it assumed the obligation to conform with federal law on the recall; it assumed the obligation on the post-sale accidents. I think, if those things are involved, then that's New GM's obligation.

And the New GM obligation actually related to Old

GM vehicles. Why? Old GM -- New GM assumed the glove box warranty with regard to Old GM vehicles. New GM assumed the lemon law responsibility as defined in the sale agreement with regard to Old GM vehicles. New GM agreed to assume post-sale accidents with regard to Old GM vehicles. And New GM agreed that, if there was going to be a recall that was necessary on an Old GM vehicle, it will do the necessary repair for an Old GM vehicle. So, New GM did have independent conduct that your Honor was not insulating as part of a sale order relating to Old GM vehicles.

But that was it. If there was nothing that New GM specifically assumed relating to an Old GM vehicle other than those things, then everything else relating to an Old GM vehicle was a retained liability. And it had no independent duty for anything related to that. That was the purpose of the no-successor-liability finding.

THE COURT: Yeah, I understand that. But if Mr. Weisfelner had shown up back in 2009 and made the same arguments he's making now, he would have said, in words or substance, that you can't protect New GM from its own wrongful conduct so long as it's independent of the Old GM conduct, whether or not it involved Old GM or New GM parts or cars.

MR. STEINBERG: If it doesn't involve an Old GM vehicle, or an Old GM part sold by Old GM, or Old GM

conduct, he would be right.

THE COURT: Well, let me tell you an example. Suppose I don't think New GM actually fixed its cars. And I don't know whether it ships the parts to mechanics that do. But suppose New GM knowingly -- and I understand this is a wholly fictitious hypothetical. But suppose New GM knowingly put a defective Old GM ignition switch into either a New GM or Old GM vehicle.

If it knew that the switch was crummy, it wouldn't be liable for having designed the switch wrong, but it would -- arguably, I'm not going to get into stuff that's Judge (indiscernible)'s issues -- but it could arguably be liable for knowingly putting the crummy part into an Old GM vehicle.

MR. STEINBERG: I agree.

THE COURT: Or New GM vehicle. And, as I read the sale order, it gets a "get out of jail free" card in that kind of conduct. The sale order and the sale agreement.

MR. STEINBERG: I don't think so.

THE COURT: Okay. Then if you're contending that that wouldn't be an issue, maybe that issue would go away. But that is a matter of concern to me because of the breadth of the documents in which you've read so much.

MR. STEINBERG: No, no. But, your Honor, I think that, if it relates to an Old GM vehicle, and somehow, when

it was sold, New GM took on a contractual obligation independently, took on a contractual obligation to warranty some aspect of that vehicle going forward, I think New GM has that contractual obligation. I wasn't looking a-- and I know it's a catchy phrase to say, "get out of jail free"; I don't think that's --

THE COURT: I tend to get a little colloquial, but you know where I'm coming from.

MR. STEINBERG: I do. I do, your Honor. I just feel that there's probably people at the company listening to what I have to say, so I wanted to at least say something in response to that, because I don't think "get out of jail free" is the right way of doing it.

But no one was looking to absolve New General Motors for independent duties that it voluntarily took on after the sale. But it purposefully did not take on responsibilities with regard to Old GM vehicles that were not assumed liabilities. And what they've articulated -- and this is dealing with the Old GM claim threshold issue -- what they've articulated is something that has nothing to do with New General Motors.

And I'll give you an example. There was -- and I think we gave a couple of these in the -- in our briefing. There is a plaintiff named Rafael Lewis who brought -- who's in the post-sale consolidated complaint. They recognize

that the presale consolidated complaint, if you're not going to upset successor liability, the presale consolidated complaint falls. The presale accident plaintiffs also recognize the same thing, that, if you -- successor liability is going to be upheld, they lose.

The reason why the lead counsel broke up the complaints between the presale and the post-sale was they were trying to isolate those issues that they think survive even if your Honor upheld the successor liability. So, this is in the post-sale complaint, not the pre-sale, the post-sale.

Rafael Lewis bought a 2006 Chevrolet Cobalt after the 363 sale at an auction for $2800 with no warranty. His claim is that, years after he made his $2800 auction purchase, the value of his now eight-year-old vehicle had gone down, because a recall was announced that was going to fix the ignition switch problem in his car that he was otherwise not aware of.

New GM did not manufacture that car in 2006. New GM did not sell him the car in -- after 2009. Yet somehow, according to the economic loss plaintiffs, New GM is required to protect the value of that car purchased by Plaintiff Lewis with no warranties from unrelated third party. You don't get there unless you have successor liability. That claim is predicated on successor liability.

There's no independent duty that they had on a transaction that they weren't involved with. And the GUC Trust jumps on the misguided bandwagon and says that, and they're equally wrong as well.

We pointed out Plaintiff Barbara Hill. She bought a 2007 Chevrolet Cobalt after the 363 sale from a Nissan dealer. New GM did not manufacture her car in 2007 and they didn't sell her a used car after the 363 sale. Yet, according to the economic loss plaintiffs, on their post-sale consolidated complaint, New GM is liable for the alleged loss in the value of her seven-year-old car after the 363 sale by a Nissan dealer.

You don't get there unless you're asserting successor liability. There is no independent duty. And you can clearly see that by understanding what their post-sale consolidated complaint tries to do.

It says that the people who are -- that New GM is liable to is not the people who just are -- had vehicles that were recalled in 2014. That's the 27 million people. It's not just them. It's everybody that New GM sold a car to since 2009, even if they had no subject to a recall. Why? Because the magnitude of the quantum of the recalls tarnished the GM brand as a whole. And, by New GM profited from selling all of those vehicles. And that's why they should be liable for the tarnishing of the brand.

Well, how does that theory make any sense at all when you're dealing with a used car sale? New GM didn't sell that car. New GM didn't profit from that car. New GM didn't make any representations about that car. That's the -- that's a critical element of their post-sale consolidated complaint; it has nothing to do with an independent duty that New General Motors assumed or not. That's the successor liability claim, nothing more than that.

When the complaint deals with what is in essence successor liability, that is what we say should be proscribed. We're not looking to try to take an independent duty. The reality is, though, they have asserted an independent duty.

The -- Judge Bernstein had this issue in the Burton case. There, they talked about the duty --

THE COURT: Burton being one of the Chrysler cases?

MR. STEINBERG: Yes. There, they talked about a duty to warn. And that was a case brought by economic loss plaintiffs. And Judge Bernstein said, "Duty to warn deals with accidents. You're not asserting an accident claim. There is no duty to warn. It's not an independent duty." He said, "What you're doing is nothing more than a successor liability claim, and I'm going to deny your ability to assert that."

That's the essence of what we're talking about here. And you also get to the concept that these are really successor liability claims when you look at the sale agreement and the sale order. The sale agreement talks about what are assumed liabilities and what are retained liabilities. If you're not an assumed liability in the carefully defined provisions of Section 2.3, then by definition everything else is a retained liability.

Liability is defined in the sale agreement as any liability that occurs or accrues even after the closing date. So, people understood --

THE COURT: Can you -- were you quoting or paraphrasing from the sale order, from the sale agreement, or --

MR. STEINBERG: I'm quoting from the definition of liability under the sale agreement.

THE COURT: Can you give me the cite to that, please?

MR. STEINBERG: It's Section -- it's in the definitions section.

THE COURT: In the definitions of the sale agreement?

MR. STEINBERG: Right.

THE COURT: And that's of retained liability?

MR. STEINBERG: The definition --

THE COURT: Or assumed liability?

MR. STEINBERG: No, the definition of liabilities is in the sale agreement, and that's what I was referring to. Assumed liability versus retained liability is in Section 2.3 of the agreement.

THE COURT: The matter being 2.4?

MR. STEINBERG: 2.3, I believe.

THE COURT: 2.3?

MR. STEINBERG: 2.3. The sale order provision is in Paragraph 46. Paragraph 46 confirms the point, when you're dealing with Old GM vehicles. It provides that, except for assumed liabilities -- again, we're not talking about assumed liabilities -- New GM shall not have any liability for any claim that, A, relates to the production of vehicles prior to the closing date, or, B, is otherwise assertable against Old GM.

Every one of their claims, the economic loss plaintiffs' claims, is a claim that's assertable against Old GM as it relates to an Old GM vehicle. The sale order proscribed that from being asserted against New GM.

And that's why we say in our brief that, if you're dealing with an Old GM vehicle, there wasn't anything that was left to chance. It was a binary choice. We assumed certain specific things -- glove box, lemon law, accidents. We didn't assume anything else. Anything else, they were on

their own.

And it's not like this argument wasn't raised at the sale hearing. It was raised by the -- at the sale hearing. This was raised not only by the consumer advocacy groups, it was raised by the states' attorney generals and they actually said things like you know, your Honor, there are people here who may not even know they have a claim and you're in effect eliminating their claim. And the answer is yes. The answer is yes.

And that makes perfect sense as well too because it wasn't like Old GM had stopped manufacturing cars two years before the sale. They were manufacturing cars throughout. There was going to be a circumstance where a car that was manufactured two months before the sale or sold six weeks before the sale that there may be an issue that related to that car and that is going to come up post-sale. And if it wasn't covered by the expressed warranty and if it wasn't an accident and if it wasn't something by the Lemon Law that person was not going to have a claim against new General Motors unless New General motors decided to voluntarily take that claim on. That was the firm cutoff.

But when you look at the sale, the sale order specifically contemplated that these claims, claims relating to latent design defects, that they could be asserted post-bankruptcy and that if they do it is not going to be

something that switches the dichotomy between what new GM agreed to and what Old GM agreed to do.

I'm trying to think. I still have a half hour I think. Your Honor --

THE COURT: I know I asked a lot of questions. I'll cut you a little bit of slack on my taking up so much of your time and of course I'll do my --

MR. STEINBERG: Your Honor, I appreciate that. It so happens that I'm so far off my outline about where I am now I probably will need the rebuttal time to figure out how to get back to where I need to be.

I want to talk about five cases that you raised as to why they're not the situation here. The first is --

THE COURT: Before you're done I also want you to help me with the similarities and the differences between Judge Bernstein's opinions that come to opposite results, Grumman Olson on the one hand and Chrysler, I think it may be Burton on the other.

MR. STEINBERG: Well, let me take that because I think Grumman Olson is actually an easy case.

Grumman Olson was a case where there was a post-sale accident and the person who was the plaintiff here had no connection, no relationship at all with Chrysler. It was a person that was driving a car that had a manufactured part that was defective, but wouldn't have known that at all.

Judge, in the Burton case, the argument was that they're a future creditor and you can't cut off their right because they had no connection at all with the debtor.

That's not in any why the situation here.

THE COURT: First, to what extent was either related to whether a claim could be asserted notwithstanding a seeming discharge on the one hand or a 363 free and clear provision on the other.

MR. STEINBERG: I think in Burton, I'm sorry, in Grumman Olson, the judge said this issue wouldn't have come up in like the GM situation because that claim, the post-sale accident claim, is assumed by new General Motors. So, we're not going to have this due process issue. We're not going to have this future creditor issue and Judge Bernstein in Burton said economic loss plaintiffs are different from the Grumman plaintiff. The Grumman plaintiff is at minimum a future type creditor and that's not what the Burton plaintiffs were. They were economic loss plaintiffs. They held contingent claims. They were unknown creditors. They would be bound by the sale order.

So, in one circumstance here you have claims that are assertable against Old GM that they are economic loss claims. They are at worst unknown creditors. I know your Honor wants me to address unknown versus known, but they're clearly not future creditors and plaintiffs don't argue that

they're future creditors.

They may like the words of Grumman, but they know that they're not Grumman. They're not the Grumman plaintiffs. They specifically said that they're the opposite of Grumman.

Grumman they said there is no way you could have notified us because we had no connection with the estate. These plaintiffs said you should have notified us and they obviously know their connection with the Old GM estate, they bought a car from Old GM. So, Grumman is not in any way related to the issues that your Honor has to tackle.

If new GM hadn't amended the sale agreement to account for post-sale accidents you would have had to face the Grumman issue in this case now. But that changed.

The Burton case is actually on point -- latent defect discovered after the sale, economic loss claim. The judge recognized that what they were really asserting a successful liability, uses the quote, "Anybody who owns a car now is not going to have a problem with the car."

This case is Burton. To that matter, your Honor, although it doesn't come up in the same exact context, this case is very similar to I think your Morgenstein decision as well too. In Morgenstein the issue that was raised was by a product person claiming that in effect that that there was a fraud on the Court, not a due process violation. They went

even further. They went to the fraud on a court section and they said when Old GM presented its plan, when Old GM presented its bar date they didn't send us the notice that they should have. They knew that there was a defect in the product that we bought. There are 400,000 cars that are affected. We should have had notice. We shouldn't be subject to the bar date. We shouldn't be subject to the injunction under the plan.

The remedies that they asked for were a little unusual. They asked for a partial revocation of the plan which there are specific sections in the Bankruptcy Code which talk about revocation of the plan and your Honor did a strict statutory analysis, but it is in my view similar to the partial revocation remedy that the plaintiffs are trying to assert here. And then your Honor said that they didn't plead fraud with the particularity, Rule 9B in the Morgenstein decision.

But fundamentally what they were arguing about was I should have gotten notice, I didn't get notice and now I'm barred because you knew, you Old GM, knew that there was a defect in my car and you didn't tell me. And their ultimate remedy was you don't have a remedy and that I think is similar to the circumstance that you Honor has here.

The five decisions, let me see if I can get this right, the Metzger decision. There was -- the county had a

covenant to the land development and they were a known creditor. People knew that they had a covenant with the land, it was a public record, and you couldn't then sell the land and then try to preserve the covenant. So, the court had to deal with that singular circumstance and the purchaser was arguing that the covenant was wiped out by the sale and that there was no way that the sale proceeds could satisfy that. So there you were dealing with a circumstance where there wasn't a monetary damage claim and the 363 sale actually reflected an extinguishment of a known property right. That's not I think what you have here.

THE COURT: But one of the reasons that I was troubled or at least, not troubled, but was worried or of the view, perhaps is the best of all the words, that those five cases could be very significant here, is that I think if that's -- you're talking Metzger by Arthur Weissbrodt?

MR. STEINBERG: Mm hmm.

THE COURT: He declined to blow away the free and clear nature of that covenant without invoking 60(b), didn't he? Was he just wrong when he did that? And I'm going to ask the same question with respect to the other four. If I think the bankruptcy judge or a district judge gets it wrong I'm free to say that. I'm much less free to say that -- I can't say that if it's a decision by the Second Circuit.

MR. STEINBERG: Well, your Honor, I think that

you've asked a very interesting broad question and I think you obviously can decide it on the narrow grounds which is the facts presented to you are not the Metzger type circumstance and therefore however the judge approached the problem in Metzger is not the same as you.

But if you're asking me on the most broad concept, which is that are there cases where you don't need to get the 60(b) in order to deal with a circumstance, there probably are, but they probably have unique circumstances as well that are not here. For example, Fuentes v. Shevin. It's whether you could --

THE COURT: (indiscernible) detachment?

MR. STEINBERG: You can have a (indiscernible) without notice to somebody. There the Supreme Court was arguing about the Constitutionality of a statute and in that circumstance the Court said that I'm going to invalidate the statute as violating the due process clause. It's not a matter of moving to Rule 60(b) because no due process was given in effect of the procedural due process, it's a sort of a substantive due process which was that the statute itself was improper.

I would say there are five cases that plaintiff's counsel have cited that fit within that paradigm which is that what actually was being done was the Constitutionality of the statute itself and a court was saying I'm not

enforcing the statute. The statute doesn't give people their elementary due process rights, that if you have a circumstance where the statute says I give publication notice for the potential extinguishment of a lien when it's a lien of public record, the Court is saying in those circumstances you'd better give direct mail notice. It's easy to give that individual lienholder credit notice and there's something wrong with the statute altogether. I'm invalidating the sale and I'm invalidating -- I'm saying they didn't get their due process rights. And they're not doing it on Rule 60(b) grounds, they're doing it based on the fundamental element of the statute itself.

So, if you're asking me whether I think in this particular case Judge Metzger got it right when he said that a covenant with the land was a situation where you're dealing with a known creditor and the direct mail notice was not provided, I think Metzger was a situation where courts have to struggle with the notion that if you're a known creditor and you didn't get notice you'd better have a good reason why and that if you knew -- if it's the type of covenant -- if it's the type of thing that's a matter of public record then there's an element that the purchaser kind of knew that as well too and therefore it's not as clean as a circumstance that we have here. So that's Metzger.

Polycel, there I think there's an easy answer to that question. In Polycel, I think you called it Polycal so either I have a typo in my outline or I got it wrong, but I think I'm talking about The 2006 WL 4452982 bankruptcy New Jersey case in 2006.

THE COURT: It's from a district judge out of Trenton if I'm not mistaken.

MR. STEINBERG: Yes. I don't know if it was the District Court or a bankruptcy court, but I have it as a New Jersey case. There the issue was can you sell molds that were used by the objector to the sale and there the Court said that the debtor didn't own the molds. So this was an issue that as a matter of Section 363 the debtor had no right to sell, that the molds were not owned by the debtor, therefore a sale of a right, title and interest where the debtor doesn't own anything didn't transfer anything.

Important to know that also in Polycel that the purchaser agreed to take the assets subject to whatever the debtor's interest was. So they took a quit claim on the molds. So when the Court carved out the situation, they weren't carving it out on due process grounds, they were simply saying that the objector is entitled to its property interest because the debtor had no right to sell it and the debtor didn't actually sell it.

That's -- then court said you couldn't say take

the sale proceeds to compensate you for the loss of your molds because the guy needed the molds for his business. They were essential to the integration of his business, that it was an irreplaceable items. That's how Polycel is a different circumstance from your Honor.

Compak. Compak was a case where a creditor did not receive the notice and he held a license to a patent owned by the debtor and the argument was that the sale order extinguished the license itself and the Court said the creditor had no remedy because of the loss of its license. It was critical for its business and that the Bankruptcy Code had special protections for patent licensees and therefore the Court wasn't going to enforce that order vis-à-vis the licensee.

And the Court also said, I think it was this case, that license didn't seem to be so critical for the --

THE COURT: I beg your pardon?

MR. STEINBERG: The license didn't seem to be so critical to the purchaser, but there was a specific property right and that the debtor had no right to sell it free and clear and was a known contractual right and therefore they were a known creditor.

We think first it starts off that they were unknown creditors and therefore the notice was proper. But in the known creditor situation when dealing with a license,

the Court said there are special protections for licensees and you can't compensate that person monetarily by saying your lien attaches to the proceeds of sale, how to deal with it in different circumstance.

So, I keep on going back to the same point, when someone sues for monetary damages then not a license, not molds used for their business, the remedy that you can afford to use is something other than -- attaching to the sales proceeds doesn't protect the objector who was deprived of due process.

Different circumstance here. When you're suing for monetary damages clearly sale proceeds can accomplish that goal.

Koepp, that's not a Bankruptcy Code case. That's a railroad reorganization case under Section 77 of the Bankruptcy Act. The creditor held an easement of the record, but got no notice of a plan which attempted to extinguish the easement.

In that railroad reorganization case they entered something called the consummation order. Under the consummation order it said you could not extinguish this encumbrance because it runs with the land and it was only going to extinguish rights if you were a claimant or a stockholder and the consummation would only apply to those people and the person who held the easement was neither a

creditor nor a stockholder.

So the Court said that the consummation order didn't govern what -- it didn't cut off this person's rights anyway because you're an easement holder, you weren't the creditor or stockholder and the only thing I was covering in my consummation order were the rights of the creditors and the stockholders.

So again, it was interpreting its order to say it didn't apply, not that they were carving out something that clearly applied for due process reasons.

THE COURT: Didn't the circuit in that case say that they found a violation of due process and didn't they blow away the extinguishment of the complaining creditor's interest without every talking about 60(b)?

Now summary opinions are called summary for a reason because they're not drafted with the precision that plenary opinions are. With that said, and I don't want to be critical of the circuit, but seemingly the circuit didn't think 60(b) was that important.

MR. STEINBERG: Well, your Honor, I think to defend the circuit, if I'm presented with an order --

THE COURT: If the circuit didn't think 60(b) is important, that tells guys like me we're not supposed to think that 60(b) is that important. I'm not allowed to think that the circuit was wrong.

MR. STEINBERG: No, no. I actually think that 60(b) is important, but I think Koepp is a case where the Court was interpreting the order that was entered and saying the order didn't apply to the objective. The order was the consummation order. The consummation order only affected rights of creditors and stockholders and they were saying that an easement person, any person who held an easement, was not a creditor nor a stockholder and therefore its rights were not extinguished and therefore I didn't have to deal with 60(b), I was interpreting the order and saying it didn't apply to them.

It was the same thing as the -- I'm sorry, which talked about the molds. You know, you cn only sell what you own. You didn't own the molds and therefore I'm interpreting the order to say that those rights in the molds weren't extinguished. It doesn't involve 60(b), it involves an interpretation of the actual order itself. And so I do think 60(b) is important except you didn't need to reach it in that case because you were interpreting the order and you were trying to decide whether the order covered the circumstance that was being complained about.

And then I think the last one is Manville IV and there I think Manville IV fits within the same paradigm. Manville IV was a circumstance where there was an injunction that was entered as part of the Manville case and the focus

of that injunction was that entities like Travelers would be protected from lawsuits and that they would be protected from lawsuits because if they didn't that would erode the insurance that otherwise was being given to the Manville estate.

So, the insurance agreement was the res that was part of the bankruptcy estate. In Manville IV the litigation was between Chubb and the insurance company and it didn't relate to the insurance. It related to whether the insurance industry had defrauded as a whole the asbestos industry and that they should have been protecting the industry as a whole and the claim that was being asserted was a contribution claim which was a prepetition direct claim that one insurance company had to another insurance company. And there the Court was saying that wasn't what this injunction was dealing with. That wasn't what the court had jurisdiction to issue an injunction. It wasn't going to prevent a direct claim against another direct claim that was unrelated to the insurance res which was what the Bankruptcy Court had to deal with and therefore it carved out and said that this didn't apply.

And then in Manville V it said that there wasn't a failure to meet a condition precedent because the injunction didn't apply to it in the first place.

Now, Manville has gone through lots of litigation.

It has gone through up and down the circuit a number of different times. That is what was involved in Manville IV. The most telling distinction between Manville IV and the case at bar is that Manville IV was a future creditor case or not even a claim at all case. They're arguing that, the Chubb is arguing it never could have been contemplated at the time of the channeling injunction under the plan that you would have this type of claim -- someone claiming that the insurance industry as a whole was defrauding the asbestos industry and therefore it wasn't contemplated, no one could have expected that type of claim and therefore it shouldn't be barred by any kind of channeling injunction.

That's not their situation, right? Their situation is that they're a known creditor, that they should have gotten notice as to the time of the sale and we cite in our papers a case which talks about, while there are similarities between a channeling injunction and a 363 sale where there's an injunction to protect the purchaser, in the Campbell case the court says while there are similarities and there are similar rationales for the protection, it's not the same and there are bankruptcy policy objectives relating to a 363 sale which are independent of the channeling injunction that's part of the plan.

So, I think, your Honor, those are the five cases that you've asked me to address. I'd like to talk a little

about the claim-specific notice issue.

The 363 notice approved by the court did not identify any specific liabilities retained by Old GM because it wasn't the purpose of the sale hearing and it actually didn't have to. The sale notice itself said it was free and clear of all liabilities and it was other than assumed liabilities. And when you say all, there's no need to break down that further into its component parts.

Importantly, the creditors committee, the states' attorneys generals, the consumer advocates and the vehicle owner attorneys never challenged the sale procedure order and the specificity of the sale notice and that was never appealed at all by any of them.

And as noted, the sale notice told parties what they needed. They told them that the sale would be free and clear liens and it gave access to the sale agreement and the sale agreement said that -- defined what were retained liabilities and said it's going to be free of successor liability claims. And this picks up on one of the questions that your Honor had asked. A more detailed claim notice would've been extremely costly and it would have delayed the sale and the value --

THE COURT: They're not really attacking the specificity of the sale notice to my understanding. They're saying that if mailed notice of the type that was sent with

-- I think they said first class mail, but maybe by hyperbole they said by registered mail, that by not having sent out the recall notices Old GM was hiding the cards. And maybe it's Mr. Weintraub's brief, maybe it's Mr. Weisfelner's or both, but one of them says even if you had mailed us the notice it wouldn't have been good enough because the recall notices haven't gone out. Could you address that contention?

MR. STEINBERG: I think --

THE COURT: Or am I imagining that they said that?

MR. STEINBERG: I don't think that they say it like that. I think they say it slightly differently. I think they say that the notice had to specifically say there was a defect and that you may have rights that are extinguished if you don't file a claim. So, they were putting the burden on the proponent in the sale context to identify all the liabilities that would be potentially extinguished by a no successful liability finding and to have it said with explicitness. That's what I think they said. I don't think they tied at all to the recall notice.

And by the way, if the recall was done in 2008, then what? If the recall was done six months before --

THE COURT: Well, if the recall had been done in 2008 I'm not quite of a mind to say you would win this in a heartbeat, but if the recall had been sent out in 2008 I

think that that coupled with the publication notice would put you in a very strong position.

MR. STEINBERG: The recall -- the element of a recall, this -- to put it in context, is that there was a defect of a safety nature that needed to be remedied. Old GM had been sued by lots of people prior to its bankruptcy based on failures to design the car properly, breaches of implied warranty of merchantability, fraudulent concealment in the context of selling the car. Those claims existed throughout.

Your Honor had to deal with those circumstances in Castillo. Your Honor, approved the settlement in (indiscernible) and (indiscernible). All of those were in effect economic loss claims. They were breach of warranty actions where there had been class actions that had been certified, but not approved as of the time of the settlement. All of those claims are Old GM claims. All of them had been paid as Old GM claims.

The recall of when you send out a notice or not is -- I don't want to minimize it, but it is not relevant to the issue that I think your Honor, has to address. The issue is whether warranty claims, design defect claims will retain liabilities and if they were then the issue is whether the sale notice was proper.

And your Honor has asked the question well, what

is the objective, what is the test that I should look at? You know, they use language like reasonably, reasonably ascertainable, but that's not reasonably foreseeable. What does it mean by looking at the books and records? Is it the same as a financial statement?

THE COURT: I take it -- that's easy. You agree that it's not the financial statements.

MR. STEINBERG: I agree it's not the financial statements. And I think that the Drexel case actually illustrated that because there you had a contractual guarantee. Guarantees don't necessarily have to be on a financial statement. It didn't mean that if you had contractual guarantee you shouldn't be noticing that creditor if it was in the context of a bar date situation. Not a sale, but a bar date. So I agree that the financial statement is not the end all be all.

But when we say books and records we're not talking about, you know, we're not talking about the financial statement. We're talking about the general ledger of the enterprise, what is listed as the creditors of the company on the company's books and records. We're looking at what the litigation calendar is. People who had sued the company. People who have made a claim against the company and that's the issue that I think your Honor has to tackle which is that if it's not a contractual claim, if it's not,

you know, the cases they cited if there's an easement, if there's a mortgage you should give notice to the mortgagee. If I have a contractual claim that I know about I should be giving notice as if I'm trying to sell or if I'm going to try to do a bar date. Those are known creditors.

But what is the objective test when you have an unasserted tort claim where the tort claimant has never made a claim for that at all? In this particular case, look at the circumstance here, you have, you know, the ignition switch recall went back as far as 2004-2005. So you have people who drove their car for five years. One of the arguments on the claim-specific notice is that they didn't know they had a problem. So they drove their car for five years. They didn't know they have a problem. It's only the announcement that we're going to cure the problem that you weren't aware of that they say creates the economic loss claim.

But if they haven't unasserted a claim and it's a stipulated fact that none of the named plaintiffs in the ignition switch action actually asserted a claim against Old GM as of the sale. So none of them asserted a claim and Old GM didn't have it on their books and records and didn't have a claim that's being asserted.

One of the things that I think this is clear also is that you can get caught up in this due process argument,

and I don't mean to minimize the importance of due process, but the reality was is that they generally knew that there was a sale hearing anyway. They've never argued, they've never put in one affidavit to your Honor that they weren't aware of the sale hearing. Whether they got the direct mail notice, the publication notice or they read one of the 1,250 newspaper articles or they watch television, you know, this was what Judge Kaplan said. No sentient American was unaware of the travails of Old GM.

And the cases that they cited which talk about Old GM's awareness of the bankruptcy filing is not the same as the awareness of the particular bankruptcy event. Well those are cases which deal with the bar date. Every case that they cite dealt with the bar date and there the courts were saying I may know that there's a sale, I'm sorry, I may know there's a bankruptcy, but I don't know in a Chapter 11 when the bar date was set. I could have my rights extinguished if the bar date is entered and I don't know about it and it's a matter of who has the burden of telling somebody about the setting of the bar date when it's not set in Chapter 11 by statute, but it's set by court order. And there those cases are saying the burden is on the proponent asking for the bar date to send out the notice and merely the knowledge of the bankruptcy filing will not obviate the necessity of giving the notice of the bar date where their claim would otherwise

be extinguished. That's not the circumstance here. But the reality is that they know. The named plaintiffs. The people that they control. The people they could talk to on a daily basis, they know if they were aware of a sale hearing or not and there's not one piece of paper that they've issued that says they were unaware of the sale hearing and the magnitude of what happened in 2009 was that everybody was aware that this was happening. This was not something that happened just on June 1. The foreshadowing of the potential bankruptcy of Old General Motors and the fact that the government was going to be the sponsor to buy the assets of the enterprise and whether that was a legitimate use of government funds was widely debated, widely publicized and widely known by everybody that was involved.

So, the issue of notice here is to some extent irrelevant and your Honor, asked the issue about prejudice and prejudice is also the same thing because it's not should I have been able to argue my issue about proving my warranty claim. That's not the issue. The real issue is would I have been able to come into court and argue successor liability any differently than anybody else argued successor liability?

THE COURT: That's the easy half. The sale order had been circulated in proposed form June 1st or June 2nd substantially immediately the proposed sale order after the

363 motion was filed. But a reasonable tort litigant may have said I'll never in a thousand years win on successor liability, but I can argue vis-à-vis the form of the order and (indiscernible).

Your problem is (indiscernible) enough to convince me that I would have not issued a free and clear. Your problem is to convince me that I would have issued a sale order with the exact (indiscernible) and language that the one that was entered ultimately turned out to be.

MR. STEINBERG: Well, your Honor, they have not articulated what it is in your sale order that they would have been able to argue was overbroad. I mean, that's a question that you legitimately have asked.

THE COURT: I thought they did. I'll certainly hear from Mr. Weisfelner and you'll have a chance to reply.

MR. STEINBERG: All right. But again, just to be clear, if there was an independent duty that New GM had after the sale, then I don't think your sale order protects them of that independent duty that Old GM had. But vis-à-vis old GM vehicles, that duty had already been parsed out and that -- nothing was going to change by that and that the timing of when you're raising the issue is irrelevant.

That issue relating to Old GM vehicles had been parsed out and there were only certain things that New GM was going to do and everything else it wasn't going to do.

The bar date toxic tort cases cited by the plaintiffs are readily distinguishable for exactly the reasons why I think your Honor highlighted in your questions and which I tried to argue before and it relates to the differences between the 363 sale and a bar date notice. The timing of when something is issued and what is accomplished by the extinguishment of a claim and that in a toxic tort situation the person actually doesn't know that they have a claim. They have to be told they have a claim. While in a sale situation here the plaintiffs knew they had a car, they knew their relevant with General Motors.

I know that I'm past my time. I just want to be able to briefly say in five minutes something about the prejudice point and then I'll say whatever else that your Honor has for my rebuttal.

The no prejudice point we've articulated as saying that when you're dealing with a bona fide purchaser the remedy can't be asserted against that entity and we also said that the sale notice attracted many objectors who argued the exact same position that plaintiffs are trying to argue now. They argued that the sale agreement should be broader to protect warranty claims, all consumer claims.

Your Honor heard the argument that if the bond exchange had been approved, everybody else would've written through the bankruptcy case other than the bondholders. They

would have converted. But now we have a sale where other people are more broadly affected including the car loans and that's why you had a number of the agencies there. You had over 40 states' attorney generals and you had the creditor's committee, the fiduciary for all creditors raising the issue about successor liability and whether these claimants should have realized that their rights were being cut off.

And the answer was that the argument was raised and their rights were being cut off. And the importance to be heard in a bankruptcy case is true, but that doesn't mean anything if you otherwise got notice of it in another way and it doesn't mean anything that if you stood up in court you wouldn't have anything new to say on the successor liability issue at all.

So, your Honor, I know we have a hard deadline and so I'm going to stop at this point in time and I'll address whatever else I need to on my rebuttal time. Thank you.

THE COURT: Okay. We'll take a 10 minute recess. I'll hear next from you Mr. Weisfelner. What is hard is the approximately 3:15 time that I need to get out of here. The rest we have some flexibility on. Refresh my recollection on what was agreed on when we return Mr. Weisfelner. Can we get you done before lunch?

MR. WEISFELNER: Your Honor, I think --

THE COURT: If we do lunch late enough?

MR. WEISFELNER: I think you can. I think between the three designated counsel in the last letter submitted to your Honor we had asked for an hour and 35 minutes. We're going to keep to the hour and 35 minutes, although as between Mr. Esserman and Mr. Weintraub I think we're going to switch their order because it makes more sense in terms of keeping the due process arguments in the same vein. But we will keep to the same timeframe that we had originally contemplated. Your Honor, we can start. You can break us for lunch or keep us here before lunch. It's really up to your Honor.

THE COURT: Well, if you can do it in an hour and a half what I think I'd like to do is give you guys to do your thing and break after that.

MR. WEISFELNER: I think that's fine.

THE COURT: There was a request by somebody for a caucus room. I said I would approve it assuming that everybody had the same ability. I mean all three of the main constituencies. I think that has been done. That will be clarified perhaps during the break. All right, we're in recess, 10 minutes.

MR. WEISFELNER: Thank you, judge.

CLERK: All rise.

THE COURT: Have seats please. Okay Mr. Weisfelner, whenever you're ready.

MR. WEISFELNER: Thank you, judge. Your Honor, by my count you had asked about eight or nine questions that were directed to me or other designated counsel and I intend during the course of my presentation to respond to each and every one of them. But I do want as a highlight and before I get into my prepared outline, I basically think that your questions were all of one variety or another of the same theme.

First, was there indeed a due process violation in this case? I think a subset of that question, what was the nature of that due process violation because your Honor also asked a number of questions that went to the question of how might that due process violation have been avoided back in 2009. And then you also asked a number of questions about what's the appropriate remedy were the Court to determine ultimately that there was a due process violation.

And one of the things that your Honor indicated that frankly troubled me and I want to address it right up front, your Honor, seemed to suggest that the appropriate remedy for a due process violation would be some semblance of a do over. I think that was the phrase that your Honor used, the do over. I must tell your Honor from the outset that I am concerned about how one would effectuate a do over.

In 2009 the ignition switch defect that we contend

GM knew about but failed to disclose, your Honor's phrase failed to do a recall, but I think it goes deeper than that and I'll get to that, was again something that had been pending for seven full years. And if we're going to do a do over how do we deal with the fact that in 2009 our new purchaser, New GM, was going to maintain that silence, was going to keep the ignition switch defect, which now we know is a pervasive safety defect, was going to keep that secret for another five full years? How in the context of a do over do we deal with that 12-year history, seven years before the sale, five years after the sale where there was a known safety defect that GM failed to disclose? I don't know how you'd do a do over in that context. If you did a do over, would it impact your Honor's ability to give them a 363(m) finding?

We also heard a lot about remedy and in the context of remedy we heard a whole long discussion about successor liability and does it apply and does it apply in the general context and does it apply in the context of, and this is critical, a car manufacturer. You didn't hear very much about the fact that GM is a car manufacturer and how to affects the law that ought to be applied in the case, but I'll get to it.

Your Honor, if the order isn't enforceable, and that's what we're here on, New GM's motion to enforce your

Honor's 2009 sale order, well if the order is not enforceable for reasons I'll explain, then your Honor' determination with regard to successor liability is likewise not enforceable and it will be up to, not this court with all due respect, but Judge Furman in the MDL or other courts that have jurisdiction throughout the country to determine what if any remedy is available to the plaintiffs if GM's motion to stop them from prosecuting those complaints is unsuccessful.

It'll be Judge Furman who decides if successor liability applies. It'll be Judge Furman who decides that that's between economic loss plaintiffs and people who were involved in fatalities or serious in injuries there's a difference qualitatively or quantitatively in terms of what they're entitlements are.

And your Honor, I've got to start with one of the last quotes that Mr. Steinberg gave you or statements that he gave you here at the lectern because quite frankly I found it astonishing.

In trying to convince your Honor that this is much ado about nothing, these are economic loss plaintiffs, what are we concerned about and it goes back to the whole notion of a due process violation and what was known when, he said that people drove for five years without filing a complaint. People drove for five years without filing a complaint and

it brought to mind the Powledge case. I don't know if your Honor remembers Powledge. That's the individual who with his five children died in a car accident and GM's defense in that lawsuit was the man committed murder/suicide.

Well that 2005 accident we now know was a consequence of an ignition switch defect and a resulting airbag non-deployment. Yeah, the family of the murder/suicide victims didn't' appreciate that they had a claim against GM.

THE COURT: Mr. Weisfelner, this is exactly the argument that I told you at the outset was inappropriate and it's particularly inappropriate because this is a personal injury or death case for which if it happened post-petition New GM is already on the hook for it and if it happened pre-petition I have said, unless you're going to tune me in wrong, that the courts have allowed the claims that could have been filed then to do it.

I want to hear arguments on the law. Forgive me, I don't want to hear theatrics.

MR. WEISFELNER: Alright. Your Honor, let's start then with the first and most important issue for due process purposes and that's that GM contends throughout its papers and throughout its argument that all of the plaintiffs were unknown creditors.

Now the second point is as a consequence of being

an unknown creditor, the publication notice that was affected in this matter was sufficient. The third point they raise is even if there was a failure of a notice and deprivation of the right to be heard there was no prejudice hence no due process violation or no appropriate remedy. Their fourth point is if the asserted liability isn't assumed within the terms of the sale agreement its (indiscernible) retained and therefore enjoined and finally New GM argues a default and therefore the remedy lies against Old GM's residual estate and not against it.

Your Honor, we've had 160 pages of briefing and we had the oral argument and aside from conclusory denials I'd ask your Honor to ask yourself the question what record evidence does New GM point to to support its contention that the pre-sale plaintiffs were indeed unknown? There's precious little in their pleadings I think that go to the record.

In their opening brief they say that plaintiffs point to the fact that a certain number of Old GM personnel were aware that there were some reported incidents prior to the 363 sale where the ignition switch malfunctioned. But then they go on to argue that the mere possibility of purported claims based on engineering issues being investigated prior to the 363 sale does not make such purported claims known.

In their reply brief they argue that Old GM had not determined that there was a pervasive ignition switch safety problem and that claims would inevitably be brought against it. Now again, your Honor, I'm not going to go through the numbers because I don't want to incur your Honor's wrath again in terms of the number of fatalities and serious injuries in the presale context which are all a matter of record in the Feinberg protocol and reported on the victim website. But we know today as New GM has acknowledged that the ignition switch defect was indeed a safety defect which necessitated a massive recall and an admission by the head of New GM that some 15 as yet unidentified employees were being fired for misconduct because they, and this is a quote, "Simply didn't do enough. They didn't take responsibility. They didn't act with a sense of urgency. Something went wrong with our process and terrible things happened." And still GM contends that the plaintiffs were unknown.

What again GM has studiously avoided throughout the course of these proceedings is the record evidence and the applicable law that mandates a much different conclusion as to what Old GM knew or as a matter of law what Old GM is charged with having known about the ignition switch defect at the time of the 363 sale. And I want to put all this into context because there's one critical point that has to be

made and, your Honor, it serves in our view to distinguish every single case relied on by New GM on the issue of what they knew for purposes of due process.

In trying to determine what GM knew or is charged with knowing as a matter of law it's critically important to remember we're talking here about a car manufacturer, not a financial services firm like Drexel or the department stores like Caldor or an oil company like Enron or whatever business in Virodyne or Agway or New Century was in.

Car companies, unlike all of those other businesses, are mandated under federal law and a very comprehensive regulatory scheme under the Safety Act and the Tread Act to maintain certain books and records regarding safety or potential safety issues. And it's those federal mandated records that GM was required to consult.

Your Honor, asked a bunch of questions of Mr. Steinberg. Are we just talking about the ledger? Are we talking about the balance sheet? And Mr. Steinberg wasn't prepared to go beyond the ledger, the balance sheet or a listing of lawsuits that were filed. Your Honor, I want to paraphrase Drexel because we're talking about a car company and in a car company case arguments about all I need to do is look at my ledger, my balance sheet, my list of lawsuits, well that's even worse than pennies on the floor not worth picking up, the quote from Drexel.

With that distinction in mind I think it's important to catalog some of the evidence that constitutes the record for these proceedings and since your Honor started at the outset by telling us that in effect you think that there was enough to require a recall by 2009, I'm not going to go through all of it, but I do want instead to turn to the conclusion. Not even the conclusion, I'm sorry, the introduction of the Valukas Report. And just so the record is crystal clear, your Honor knows we didn't get to take any discovery in this action and as the Berman affidavit that was submitted as part of our papers tells you discovery in front of Judge Furman on the MDL, while it's been laid out in connection with bellwether trials, that discovery doesn't in effect even begin until some time in the future, isn't schedule to reach any kind of conclusions until I think phase one discovery runs through May. Phase two discovery runs through October and depositions of former and current employees, including those that were terminated because of misconduct and because they didn't do enough and didn't act with a sense of urgency, those depositions don't even begin until after the phase one discovery is over.

So, what record do you have? Well, as your Honor indicated in your prior order, the record in this matter would include such information as would otherwise be available in a Rule 7056 context. You got Mr. Berman's

affidavit. You got my affidavit and there are only two things in my affidavit I want to highlight today. One is Exhibit C, which was an August 2005 email from Laura Andress, a GM engineer, to James Zito, another GM engineer. And again, I'll paraphrase. She was talking about one of the subject cars and the design of the ignition switch and what she wrote in that email is, and I'm quoting, "I think this is a serious safety problem, especially if the switch is on multiple programs which this switch was. I'm thinking big recall. I was driving 45 miles an hour when I hit a pothole and the car shut off and a car driving behind me that swerved around me. I don't like to imagine the customer driving with their kids in the backseat on I-75 and hitting a pothole in rush hour traffic. I think you should seriously consider changing this part to a switch with a stronger detent."

Now, your Honor, I'm going to turn to Exhibit B, the May 29, 2014 report of Anton Valukas and what Valukas tells us is that as a car manufacturer there were several processes used by GM consistent with its obligations under federal law to identify safety issues including what's referred to as the TREAD Database and the PRTS or Problem Resolution Tracking System database. And those databases are supposed to contain all sorts of different information including without limitation customer service requests,

repair orders from dealers, internal and external surveys, field reports from employees who bought to test drove GM vehicles and then captured information on what's referred to as the CTF or Captured Test Fleet reports, complaints from their OnStar center, which by the way had 365 cases of air bag non-deployment reported in the 2005-2006 timeframe, and a database maintained by GM's legal department to track complaints in court or out of court.

What does a review of those databases tell us? And again, I'm not going to go through the report in detail. Your Honor has it as part of the record.

THE COURT: Yes and apropos to that, is your point that Old GM should have issued recall notices before June of 2009, which as you properly observed, I already agree with or is it a different point?

MR. WEISFELNER: It's a different point. It' related, but it's different and I'll get to the point and then I'll move on.

THE COURT: Get to the point and then put the meat on it so I know the relevance of this other than to again show me that New GM was bad, which you're already ahead on.

MR. WEISFELNER: Okay. Your Honor, my point is this, that as a matter of bankruptcy law and as a matter of due process concerns, what the cases tell us is that what you're entitled to by way of due process is a function of

whether or not you are a known creditor or an unknown creditor. My opponents take the position in trying to enforce the 2009 order that due process wasn't violated because the plaintiffs were all of them are unknown creditors and for bankruptcy purposes and in terms of asserting or determining whether or not you had a claim and you were entitled to a certain level of due process, our contention is that we were known creditors and it's not a test of being forced to demonstrate what GM knew, rather it's a matter of law in terms of what GM is charged with knowing.

And GM as a car manufacturer is charged with constructive notice the cases tell us -- constructive notice of what's in their databases, what's in the TREAD database, what's in the PRTS database. And your Honor I will tell you that I think that there is a terribly important series of cases that are cited in the Valukas report and they were referred to in our papers and they are the report -- they are the cases that are listed in Appendix A to the Valukas Report.

And what those cases stand for is the proposition that if there's a known safety defect a car manufacturer has to report that to NHTSA and notify the owners. And by statute we know that a defect is one that creates unreasonable risk of an accident or a risk of injury or

death as a result of an accident. And we have a string of cases there are cited to us in the Valukas Report starting with U.S. v. General Motors, a district of DC case in '97, and I can give you they cite. It's 565 F.2d 754, the jump page is 760.

And in that case the court rejected the argument that very few incidents were likely to occur in the future. Like GM tells us that the ignition switch defect operated properly for a majority of the owners. That argument was rejected by the Court. It required GM to do a recall and its argument was that from the beginning the part at issue there didn't meet manufacturer's own standards for proper assembly and absent notification will in the future cause at least some operators and passengers to be confronted with a clear danger. To the same effect as Dole v. Ford, the Porsche case and the two other GM cases that are cited by Valukas.

But then we have to go on to look at two other cases and in particular U.S. v. General Motors, an '83 case which stands for the proposition that a car manufacturer incurs a reporting obligation when it actually determined or should have determined that a safety-related defect exists. That's 574 F. Supp. 1047, the jump site is 1050.

THE COURT: Incurs an obligation to undertake a recall.

MR. WEISFELNER: Yeah, whether it actually

determined or should have determined that there was a safety defect and to the same effect is U.S. v. General Motors 656 F. Supp. 1555 out of the same court, a manufacturer can't avoid its reporting requirements by intentionally failing to reach a determination that a defect is a safety-related defect.

THE COURT: So are you repeating all of this because you're asking me to retreat from my tentatives that I already agree with you?

MR. WEISFELNER: No, your Honor, again it's because I'm trying to underscore the fact that if there were a due process violation, and we contend there was because we were known creditors, it gets us to the next issue and the next issue is what manner of notice would have been required as a consequence in order to avoid the due process issue? And our point is if GM knew it had a safety defect then it was required to give notice and since it and only it knew it, it had to give notice of a type sufficient to advise the claimant, not only that there's a bankruptcy proceeding and a bankruptcy hearing at which your rights are going to be affected, but here's the nature of your claim. Absent telling people that there was a defective ignition switch in their cars that was a safety defect by definition and could cause the air bag non-deployment, making any accident you were in even that much more severe, they could have visited

every single plaintiff and told them in person there's bankruptcy hearing, there's a sale hearing going on and that sale hearing may affect your rights.

Well, if I don't know what my claim is, how do I know what my rights are that I need to protect? No form of notice, either mailed, in person or by publication, is sufficient to advise a creditor, who all these people were at the time, and known creditors from GM's perspective, but unknown from their own perspective that they had a claim that was worthy of protection.

Nowhere does GM even attempt to address our imputation cases. You didn't hear any of that in connection with today's dissertation. Our imputation cases stand for the proposition that imputation is proper, even if knowledge was never communicated to senior management. Employees' position within the corporate hierarchy is irrelevant for imputation purposes as long as they obtained their knowledge while acting within the scope of their employment and Old Gm is charged with the collective knowledge of all of its employees even if no single employee possessed all the relevant knowledge or was individually responsible for acting on it.

Now the best that can be said for the failure to disclose what was a known safety defect and the fact that it was a known safety defect is imputed to GM as a matter of

automobile law and general due process law in the bankruptcy context, the best that can be said is that it was related to the tremendous pressure that GM was under. And your Honor asked the question about whether or not due process concerns can change given the exigencies of the situation, the melting ice cube, the need to conduct the sale before money runs out.

Well, I think the cost issues infected GM's decision. As the record reflects they were cutting costs dramatically. That is part of the reason why the TREAD database personnel were cut. The group charged with running that database was paired down in the timeframe leading up to the petition. But we think more insidious than the cost issues was the cultural issues at play here. The record is clear that personnel who tried to raise safety concerns regarding the ignition switch defect got push back. There was a fear of retaliation. You don't write reports using the word stall, safety or defect and that comes from the quality brand manager for the Cobalt cases themselves, cars themselves.

Were these owners reasonably ascertainable? Based on the record and based on the law the answer is yes. There was no semblance of a diligent examination of GM's records and database which they were required under federal law to maintain which would have readily disclosed these creditors

and the nature of their claim. And there can't be any question about GM's ability to identify the owners. Their own stipulation of fact number 18 acknowledges that its contract with R.L. Polk provided it with the ability to obtain the names and addresses of vehicle owners.

And, your Honor, I couldn't do the math as quickly as (indiscernible) could, but in their papers they told you that direct mail notice would have cost $42 million, but that's for the 70 million cars. I don't know what direct mail notice would have cost to 27 million people that may have been impacted by the ignition switch, but the point is they could've gotten away with and they could have cured the due process violation whether it was direct mail or publication by letting people know what the nature of their claims were, by telling people that were involved in accidents or stall situations that we know why your car was involved in those situations. We have a known safety defect associated with out ignition switch. But they didn't.

There are two leading cases on the question of whether or not these were known creditors don't help them. Morganstern wasn't a due process case at all. The plaintiff contended there was an undisclosed design defect that gave rise to a fraud on the court and your Honor concluded that the pleading requirements of Rule 9(b) had not been met. Allegations that GM knew of the design defect were

conclusory, not supported by the evidence. Quite different from our case.

Burton again is not really a due process case. The Court didn't deal with our question, were claimants known or unknown. The Court assumed the successor liability shield was in place and the decision therefore is one of contract interpretation -- what claims were assumed versus retained.

Your Honor, quite frankly, the content of your Honor's sale order is irrelevant to parties to whom due process was denied -- all of it including whatever your Honor may have said or found or determined with regard to successor liability. That's ultimately, if your Honor agrees that our rights were impacted such that the order should not be a bar to our pursuit of claims, are to be determined by a court of competent jurisdiction.

Your Honor, Drexel tells us --

THE COURT: Which you're saying I'm not.

MR. WEISFELNER: Your Honor is not with regard to the remedy that the plaintiffs seek in either of their two consolidated complaints. Your Honor's role, I would suggest, is to determine whether or not your Honor's sale order in 2009 serves as a bar to the prosecution of those litigations which is obviously a core function of your Honor. It's your order. It's yours to interpret. But I do think that because there was a violation of due process, these were known

creditors who weren't given any semblance of notice that would satisfy due process, those orders cannot be used to bar prosecution of their claims.

Now, Mr. Esserman and Mr. Weintraub will talk about something other than the presale plaintiffs and especially those involved in the economic loss scenario. Even those plaintiffs involved in the economic loss scenario do have direct claims against New GM that, I respectfully submit, were not intended to be and could not have been in effect precluded by virtue of the sale order. This is an effort by New GM to get a get out of jail free card. There were direct obligations.

THE COURT: Well, forgive me Mr. Weisfelner, but aren't both sides looking for a get out of jail free card? You're looking for a get of jail free card on successful liability provisions that were argued by different guys and the GUC Trust says there are eight people in Mr. Weintraub's. I don't know if it's that limited or not. But all of the other people who were in car wrecks have prepetition claims and the folks in Mr. Weintraub's group who are asserting the same prepetition claims are saying that they get a get of jail free card from a ruling that I issued on exactly the same arguments were made back in 2009. That's (indiscernible) and (indiscernible) Philadelphia (indiscernible) and a bunch of others.

MR. WEISFELNER: And --

THE COURT: So let's try to be fully attentive to the fact that it may be both sides in this case that are overreaching.

MR. WEISFELNER: Well, your Honor, let me try my best to address that because I understand your Honor's issue with regard to the arguments that were made on successor liability and, your Honor, all I'm suggesting is that were your Honor to determine that the 2009 order does not bar these plaintiffs from pursuing claims in courts of competent jurisdiction on whatever theory they may ultimately espouse it will be up to Judge Furman to decide whether or not successor liability standards are met.

For all of the reasons Mr. Steinberg indicated, he may very well conclude that the plaintiffs don't meet or exceed the threshold pleading standards on successor liability. I think they do. But beyond successor liability theories, the plaintiffs in the presale cases have recognizable claims that run directly against New GM.

Let's not forget, and this sort of goes back to my thesis that you can't do a do over, for five years following the sale, New GM failed to disclose what it knew, what it's charged by law of knowing and that is that the ignition switch defect in the presale cars was dangerous. That failure to disclose is separately and independently

actionable and your Honor's sale order could not have, should not have, and in our view did not as a matter of law extend to provide New GM with a cleansing of liability for whatever theory the plaintiffs may be able to assert that a court of competent jurisdiction will ultimately determine is valid or invalid.

And it's not just successor liability type claims that the pre-sale plaintiffs would rely on. But because there was a due process violation here the only effective remedy, the only remedy that the case law tells us is applicable, is that the order can't be enforced against them. And the notion that we'd have to prove that we would have a different result is first of all, not what the case law provides. It's not what Fuentes provides and it's not what the other cases we cited in our brief provides. There's no such thing as a no harm no foul due process violation.

Beyond that, and the cases are legion that talk about the impropriety of using hindsight or speculation to determine what would have happened had we rolled back the clock. What would have happened had treasury determined that there was a five-year long cover up of a dangerous situation involving a line of cars that had caused fatalities, that have caused serious injuries, and I know your Honor doesn't like to hear it, but it had an individual convicted of manslaughter for killing her fiancé and other egregious

situations, had treasury that that was the fact and had treasury been aware that the cover up would go on for another five years, do I know whether or not playing chicken with treasury at that point to get him to change their line in the sand on what was commercially necessary for New GM to survive, what sort of public firestorm, congressional inquiries, attorney general investigations would we all have been treated to in 2009 that we were treated to in 2014 that may have impacted whether or not treasury, who again is a functionality of taxpayer base and its taxpayers implicated and affected by this cover up, what they would've done to preserve GM and to avoid a liquidation.

It's just as reasonable to expect that they would have changed the line in the sand they drew to include the claims and only those claims that were impacted by the five year known ignition switch defect safety defect that was undisclosed by GM in violation of their obligations under federal law.

I don't know what would have happened had those facts been raised. With all due respect, I don't know what your Honor knows for a fact what would have happened. That's why the case that tells us don't speculate. Don't take a hindsight view. It's enough if due process was violated. We're not going to go through the process of attempting to do a do over, especially in this case because I think a do

over would require us to in effect go back to the future again to figure out whether or not they'd be entitled to a 363(m) order if we know in advance they're going to maintain the cover up for another five years.

Your Honor again, I don't need to remind your Honor what the briefs say on whether a creditor who is notified of the bankruptcy or is aware of the bankruptcy is in the same position with regard to their claim if they're never told about the claim as a creditor who has notice of the claim, but not of the bankruptcy. That's Waterman, that's Tillman and they haven't told you any cases that stand for any different proposition.

Again, as the Second Circuit in Chateaugay teaches, to expect claims to be filed by those who have not yet had any contact whatsoever, what the tort fees are, has been characterized as absurd. Mr. Steinberg argued that well, but you did have contact with GM -- you bought the car. Well, but no one told me that the car I bought had a hidden, known but undisclosed safety defect so how did I know I was supposed to file a claim?

And your Honor, I will tell you that I don't think it's necessary to spend a lot of time on the contention asserted by GM that somehow 363 sales provide some sort of due process exception. A proposition of claims is supported by the Edwards case. I think Mr. Steinberg made reference to

Edwards by my count seven times during his oral argument out of the Seventh Circuit and his brief they also cite to the Paris case out of the District Court of I think it was Maine.

Well, your Honor, obviously neither Edwards nor Paris is controlling. Both have been criticized if not overruled in the case of Paris, and Edwards was criticized in a number of cases including Excel Concrete, Savage Industries and the Second Circuit has only recently reconfirmed the applicability of due process concerns in bankruptcy proceedings in the Colt case.

And your Honor, our brief had a laundry list of due process cases in the 363 context, five of which your Honor pointed out. But in addition to those five, you have National Type, Folger, Excel, Savage Industry, Reiner in addition to the Metzger case that your Honor pointed out, Compak and the others. There's also Schwinn Cycling and Ninth Avenue v. Remedial Group -- all of which stand for the proposition that due process pertains in a 363 sale notwithstanding the need for finality, notwithstanding the circumstances that generally surround the 363 sale. And of course, your Honor, you then have Grumman. And lest there be any confusion, we collectively represent not only plaintiffs in the presale complaint, but plaintiffs in the post-sale complaint and the point that was made in our papers and in

particular in the GUC Trust papers that at least as to people that didn't buy a car until after the 2009 order was entered, no way to give those people notice. They weren't contingent creditors. They were the future creditors that Grumman spoke to and they couldn't have gotten adequate notice and as a consequence as a matter of due process the 2009 were cannot be read against them.

What remedies they may ultimately have for the injuries they complain of will be determined by a court of competent jurisdiction. And, your Honor, you did cite the Lane Hollow in your opening questions. We think Lane Hollow and Fuentes are the cases on you don't look for prejudice. There's a, in effect to ask a question about whether or not in that particular case due process would have led to a different result is not the issue that we're supposed to be focusing on. We're supposed to avoid hindsight and pure speculation.

Your Honor, as I think about it the prejudice, if one wants to focus on it, in this particular case is very acute. Not only didn't we have the opportunity in effect to convince treasury that under the egregious and special circumstances of this case their line should have been moved, but so much has been written about and so much talked about cases in 363 where listen, understand that what we're doing is we're converting your claims against the debtor

into a pot of proceeds that came to use from the sale and when you think about it, if your claims get to attach to the proceeds and otherwise in the absence of the sale there would have been a liquidation and proceeds to realize, how you really prejudice.

Well, the amazing thing about this case that no one seems to focus on, or at least New GM doesn't in its papers, is the bar date followed the sale by a period of time. By the time the bar date showed up no one at Old GM and nobody at New GM who is now in possession of all of the books and records, the same books and records that is the matter of federal law, mandated the conclusion that they knew there was a safety defect with regard to the ignition switch defect, told any of the plaintiffs listen, now we're down to the bar date, this is real serious stuff. 363 we could, your Honor, not pay that much attention to because there are exigencies and we've got melting ice cubes and we've got to sell fast, but here's the bar date. So now we're really going to make sure that you know about your claims so that you have the right to attach yourself to the proceeds. That didn't happen in this case, judge. And if we're going to do a do over, I would assume part of the do over is we get a record that would make sure that claimants knew the nature of the defect, knew what their claims were, had an opportunity to assert a claim.

The barn door has been open for an awfully long time. The amount of value in the GUC Trust has been substantially dissipated. Our opportunity to get back into the fold and realize the same pro rata distribution as other affected general unsecured creditors doesn't exist through no fault of our own.

THE COURT: Well, when you say no fault of your own, this is a good time for you to answer the question I asked at the outset which is that when Ms. Rubin and her clients made it pretty clear that there was going to be an upcoming distribution you didn't act.

First of all, I assume that you're not disclaiming notice or of the fact that there's court where you could have made an application to me to block that distribution and most likely gotten it in a heartbeat.

MR. WEISFELNER: And most likely have --

THE COURT: Got me to tell Ms. Rubin to wait before making further distributions in a heartbeat.

MR. WEISFELNER: It wasn't an easy decision and not one that was decided by me or my office. In point of fact the fact of the impending distribution was first brought to us, if I recall, by New GM's counsel and New GM's counsel suggested that we may want to seek to hold up that distribution and our reaction was well don't you have an obligation as well since you're saying that the remedy that

the Court ought to fashion is against New GUC Trust, why isn't it your obligation to seek the Court's intervention to hold it up and in fact there was correspondence that was crafted and sent to Ms. Rubin and her clients which suggested that it would be inappropriate for her to make that distribution.

And, your Honor, there was a consideration of what the standards were for injunctive relief and I appreciate after-the-fact your Honor telling us that we would got it in a heartbeat, but there was concern about the cost and expense associated with meeting the preliminary injunction standards.

Now, I will also tell your Honor, lest you continue to look at me like I have two heads, yes there was a strategic element to the decision that was taken on our side. That's my point of view. It's kind of disingenuous, one would have argued within the confines of the attorney client privilege, but you can assume that the argument went something like we're taking the position that we're not required, to pursue to the exclusion of every other remedy, our claims against the GUC Trust. So now to prevent the GUC Trust to making what amounts to a diminimous distribution in light of the totality of the consideration that they ever had and we had a very short window of time after they told us that they weren't going to voluntarily stop, yes your

Honor, the decision was made not to pursue it.

THE COURT: You're not seriously suggesting to me that in your fairly illustrious career you've never been able to get out a TRO request in this kind of time.

MR. WEISFELNER: Your Honor, again, it wasn't a function of whether we could get out a TRO request, it was a function of whether or not we'd prevail. And, your Honor again, hindsight is 20/20 and there were many people on our side of the table that thought that a TRO was appropriate. There were people at New GM that at one point thought a TRO was appropriate and for better or for worse for strategic reasons or otherwise the fact of the matter is that we did not attempt to prevent the GUC Trust from making a distribution.

That doesn't change the fact that by the time of the recalls, by the time the plaintiffs got organized and began their litigation, by the time we were retained in this case, a substantial majority of the funds originally in the GUC Trust had been dispersed to GUC Trust beneficiaries and it would have been impossible or very close to impossible to put the ignition switch defect plaintiffs back in the same position they would have been in had they been given enough information to file a claim before the bar date.

And, your Honor, all of that says nothing about the contention, with which we disagree, that the GUC Trust

has raised with regard to equitable movements. Your Honor, again, we are not seeking a reversal or a modification of your Honor's order or the 363(m) finding, although once again if we were doing a do over and we were to know in 2009 everything we know today, I don't know how you'd take into account the fact that New GM would for a period of another five years fail to disclose what by law it was charged with knowing constructively or actually about the ignition switch defect and how that may have impacted your Honor's determination.

The lack of notice and an opportunity to be heard is what makes the plaintiffs not bound by the sale order and free to pursue their state law claims against New GM. Now, I also have to point out that the claims regarding cars manufactured and sold by new GM, I think new GM concedes are not subject to this sale order, and claims regarding cars --

THE COURT: Say that slower, because it's a matter of considerable importance.

MR. WEISFELNER: All right.

THE COURT: Which claims are not subject to the sale order?

MR. WEISFELNER: Claims regarding cars that were manufactured and sold by new GM.

THE COURT: Oh. I think that's right. Mr. Steinberg can confirm that, but I thought that has never

been an issue.

MR. WEISFELNER: Well, I think I heard him say that, to the extent that new GM sold a car, but it contained a part designed or manufactured by old GM --

THE COURT: That's a different issue because the order said cars or parts, and that is what I was asking both sides to focus on.

MR. WEISFELNER: Yeah, and again, Your Honor, again, by way of demonstration of prejudice, I think, that had the Plaintiffs known about the ignition switch defect, known it had been around for five years, known that it was a safety defect, known that it caused airbag non-deployment, known that the part may be continued to be installed in cars that were going to be sold by new GM, we would have pressed for an appropriate carve out in the sale order to insure that a known safety defect not be replicated and continue to be incorporated into cars that are about to be sold. Using a switch with a known safety defect was new GM's choice, and new GM bears liability for that decision.

THE COURT: To what extent to I have evidence in record telling me the extent to which old GM ignition switches were stuck in new GM cars, or installed in new GM cars? That was one of the things I was trying to grope at in my earlier questions.

MR. WEISFELNER: Your Honor, to be frank with you,

I don't know what the record is about new GM cars that had old GM ignition switches, which is either purposefully or accidentally installed in them. They were switched out at a third-party repair place. And frankly, I would think that that sort of inquiry, that kind of discovery, would take place at the MDL and would ultimately be determined as a matter of fact by Judge Furman. But sitting here today, I'm afraid I can't tell you because I don't know any part of the record that tells us how many new GM vehicles had old GM parts. The other point to make, I think, Your Honor, is that these Plaintiffs hold the claims under state --

THE COURT: Which Plaintiffs?

MR. WEISFELNER: Primarily, the Plaintiffs in the post-sale complaint, hold claims under state consumer protection laws, arising out of new GM's failure to comply with its obligations under the Safety Act. Doesn't require us to be private Attorney Generals under the Tread Act or the Safety Act. Rather, as is contended in the complaint, and in some of the complaints filed, for example, in Arizona and California by various Attorneys General, it is the violation of Federal law, which is a predicate for the contention that there has been a violation of State consumer laws, and I don't think that new GM got, saw to get or, Your Honor, intended to give them a pass on their post-sale alleged violations of consumer protection laws in the

various states.

Your Honor, my bottom line point is, and I think, again, this sort of gets down to a policy question, and Your Honor, I agree that we need to be concerned about what gets said and done about 363 sales, especially 363 sales that are done in emergent situations, for Debtors that are on the verge of dissolution in the absence of the only deal that's being made available to them. But I do think that this is a very, very narrow carve out. We are looking for a situation where we have a Debtor, a car manufacturer, who knows and is charged with constructive knowledge, that it has put into the marketplace, and on the highways and byways of this country, cars with a known safety defect. And in that context, in order to have the 363 sale happen, with parties being able to protect their rights, they've got to give adequate notice of the existence of the claims that arose as a consequence of having sold those cars with a known safety defect, and the failure to give that notice, whether it be by publication or direct mail, is an unremedial violation of due process. The notion that you have to show prejudice, it's not in the case law. Talk about being bound by Second Circuit authority, it's not in the Supreme Court authority. You don't have to show prejudice. The prejudice cases they talk to you about are all cases that say, "You can glom onto the proceeds of the sale."

That's chutzpah in this case, Judge, with all due respect, because roll forward to the bar date. These Plaintiffs were in no better position to file a claim based on what GM knew and failed to disclose. So how can you say, "No harm, no foul, you just attach to the proceeds" when I couldn't attach to the proceeds because I didn't know I had a claim. And the same can be said, by the way, for the discharge of the case, or the discharge of the company, when the case confirmed.

THE COURT: Well, time out. I take it we agree that there's no discharge in a liquidating 11.

MR. WEISFELNER: We agree that there's no discharge on a liquidating 11.

THE COURT: So what discharge are you making reference to?

MR. WEISFELNER: Your Honor, I'm just talking about from a policy perspective, to have a Debtor who sells assets and continues on in business, not our -- not this case. So I won't focus on it. I'll just focus on the fact that the prejudice that befell our clients was multifold, and can't be remedied. First of all, to the extent that you followed the cases, and I think you have to, that says that a due process violation doesn't require a demonstration of prejudice. You don't have to show that you would have won. Couple that with the fact that it's our position that, had

the firestorm that we saw happen in 2014, because of the 12-year non-disclosure of the safety defect, been on the record as of the time of the sale hearing, I believe it's just as reasonable to suspect that the line drawn in the sand by the Treasury would have changed. And the last form of prejudice, I think, that we can't overlook is the fact that, come the bar date, new GM or old GM continued to fail to give us any indication that we had claims based on a known safety defect that existed in all of the cars, that they refused to give anybody notice of, and they were charged with knowing it as a matter of law. Your Honor, I want to reserve enough time for both rebuttal and for my co-counsel.

THE COURT: Well, let me hear from Mr. Esserman and Mr. Weintraub next.

MR. WEINTRAUB: Good morning, Your Honor. Between Your Honor's questions and Mr. Weisfelner's presentation, I've been taken way off of my outline, so I'm going to try to address some of the things that Mr. Weisfelner --

THE COURT: All right, let me interrupt you for a second --

MR. WEINTRAUB: Sure.

THE COURT: -- Mr. Weintraub, and to help guide you. I would like you to help me understand what are the things you're talking about, also what categories they're in. Are they people who never got to get any kind of claims

in against old GM, or were they those, like, a separate pleading that I got after most of all of the briefing was done, are looking for the opportunity to re-negotiate settlements because their cases may have been stronger than they thought they were, or are they in some further category? I think you're ahead, subject to Ms. Rubin's ability to be heard on the fact that you might be entitled to some kind of (indiscernible) style relief, and the opportunity to file claims if you didn't get to do that, but you're still behind on your ability to go after new GM because other people very similarly situated made these same arguments you're making about successor liability and they lost. So, argue accordingly.

MR. WEINTRAUB: Sure. Well, let me start with what I think was the first question, Your Honor. We think the number is at least 150 people. I don't know where they four or eight people came from. One of the actions filed in front of Judge Furman is an action that was filed by Robert Hilliard that covers 140 people and that's just --

THE COURT: Okay. And those are 140 people joined rather than a class action?

MR. WEINTRAUB: I think that was filed as a class action, actually, Your Honor.

THE COURT: Okay, a class action to get into adjudication on the common issues, and then to deal with

their individual specific ones thereafter?

MR. WEINTRAUB: That's what I think, Your Honor. There's an exhibit to that complaint. The complaint alleges they're all pre-sale accident victims. Some of them are fatalities, some of them are injuries, all of them, as I said, occurred before the sale hearing.

THE COURT: And pause once again, my apologies.

MR. WEINTRAUB: I'm sorry?

THE COURT: I assume that under Reading Vs. Brown, a narrow subset of your group, if any are in that category, if they were hurt after the filing on June 1st, 2009, but before the sale, they'd have admin claims against old GM, but they'd still be claims against old GM.

MR. WEINTRAUB: Your Honor, our position is that we don't think we should be barred by the successful liability shield, with respect to the legal point you're making, that may be correct. I don't represent any of those parties, so I don't have the particulars of those cases to know whether or not anybody fell within that, that --

THE COURT: That window, so to speak.

MR. WEINTRAUB: Right. But, Your Honor, with respect to what Mr. -- if I'm pronouncing his name incorrectly, I apologize - Jakubowski argued, Mr. Jakubowski argued lack of subject matter jurisdiction, and he argued that, as an academic issue, not as a -- based upon what was

actually going on, or the undisclosed issues in the case. So what Mr. Jakubowski was arguing was, this Court did not have subject matter jurisdiction. You had ruled, in your sale order, that you did have subject matter jurisdiction because you could sell free and clear of in personam claims under Section 363(f), you relied on Chrysler, which in turn relied on TWA, and the District Court on appeal, even though that appeal was dismissed as being moot because Mr. Jakubowski did not try to get a stay pending appeal, did go to the merits and say, "We've looked at this issue, and we think that there was subject matter jurisdiction." We are not questioning subject matter jurisdiction. That ship has sailed.

Our issue is completely and solely the due process issue of whether or not we should be bound by the successor liability shield, and the reason that we don't think we should be bound by the successor liability shield is because we were unaware of the ignition switch defect that had a seven-year history within old General Motors. And I won't repeat everything that Mr. Weisfelner said, but there are internal reports, there was as we noted in our brief, the Wisconsin State Trooper report which actually figured out the connection between the airbags not deploying and the low torque in the ignition switch, and that was all in old GM's files. We think that everyone who had that -- the affected

vehicle, had an ignition switch defect, because that defect was in the DNA of every one of those manufactured vehicles.

So, as Mr. Weisfelner said, you've got this group of potential Plaintiffs that all had that ignition switch defect, and they all had a right to have that car repaired. We're in a special subgroup of that. Not only did we have that defect, but that defect manifested itself in the form of an accident. And clearly, because we had an accident, we were aware that we had a claim. What we were not aware of, Your Honor, was that causation was due to the ignition switch defect, that the ignition switch defect was the fault of General Motors. Causation and fault --

THE COURT: Pause, please. In substance, you're saying you knew you had a claim, but you didn't know how strong your claim was.

MR. WEINTRAUB: I knew -- let me amend that. I knew I had an accident. I didn't know why I had it. It could have been my fault, it could have been an act of God. What GM knew, what we contend GM knew, was it was the result of the ignition switch defect, which it knew was in the vehicle, and which it knew was in the vehicle before I had the accident. Not only did they not tell me about the ignition switch defect before I had the accident, they didn't tell me about that defect after I had the accident. Had I known about that ignition switch defect, that sale

hearing would have been a very different hearing, and as Mr. Weisfelner said, you can't get in your time machine and see what would have happened and that's why the Court shouldn't speculate.

We had a different analogy in our complaint, and we said imagine the firestorm that would have occurred had a whistleblower on the eve of the sale hearing come forth with all of the information in the DeLuca report. And that's why we contend that it's unknowable what would have happened at the sale hearing, it's unknowable what the Federal government would have done. Would the Federal government have continued to try to ram through a sale free and clear of successor liability, knowing that this ignition switch defect had been withheld from the public and from vehicle owners for seven years? That's speculative, but I think we should get the benefit of the doubt on that, and the inference on that.

Why? It's very clear, Your Honor, that any sale, notices are a very important issue for the due process reasons. Notice was that, the timing of the sale, the form of the sale motion, the form and content of the notice, were all controlled by both new GM and old GM. This case wouldn't have filed when it filed unless the government said, "We're ready to file." This sale motion was set on the government's timetable. In any sale, notice is

important, not just to the seller because the seller has the information, but because the notice is critical to the buyer. It's the buyer that wants to bind people with the results of the sale hearings, and either new GM or Treasury or whoever was lackadaisical, lazy, negligent or didn't care, but they should have been, just like any other commercial buyer is, in any other sale that I've ever been involved in, very involved in making sure that that form of notice and the scope of the notice is adequate.

What should have the notice said here? The notice should have said, there's an ignition switch defect in these vehicles. This ignition switch defect causes unexpected stalling, which would result in loss of power to the steering, loss of power brakes and the inability of the airbags to deploy. With that information, people would have been able to come to Court and make an effective argument against successor liability. What kind of arguments would people have made against successor liability? Clearly, unclean hands would have been an issue. Clearly, whether or not it would be equitable to sell free and clear of successor liability claims in circumstances like this one, where the buyer had -- I'm sorry, the seller had withheld the information for seven years before the sale. This would have been a maelstrom of a hearing, even much more contentious than the hearing that we actually had. And by

saying that new GM gets to hide behind the sale order, let's think who was involved in putting together the notice in the first place. The notice was put together by old GM. What old GM knew was a nanosecond after the sale closed, it was going to be come new GM. It wanted nothing more than to leave these liabilities behind, so it didn't disclose. Not only did it not disclose, it wasn't disclosed for another five years after that.

So you would be rewarding the conduct of old GM as it morphed into new GM by saying that new GM is not subject to these successor liability claims. You've got the very same people that populated old GM and were investigating the ignition switch defect, are now populating new GM. It's efficient to say that they're separate companies and that there's no connection between old and new GM. There's a very close connection between old and new GM, and to reward new GM, which is just old GM in a new bottle, for the lack of disclosure, would be inappropriate, in our view. Which again, is one of the reasons why, if you're going to go and look at prejudice, which, as Mr. Weisfelner says, and we agree, is not something that the Court weighs when you're looking at a due process violation, I think the due process violation is just being deprived of the opportunity to be heard in a meaningful way when it matters. That was the violation. Not that we would have won anyway or we would

have lost anyway. We were deprived of the opportunity to make our best arguments when they really mattered. But the reason that it's not prejudicial to new GM is, like I said, new GM could have been more involved in the notice and it wasn't, and new GM is populated by the same people as old GM. So, when you weigh the equities here, we think the equities weigh in our favor. In terms of the Manville remedy, this is not a Rule 60(b) proceeding. My clients didn't make a motion. I didn't file a motion. Mr. Weisfelner didn't file a motion. GM filed a motion to enforce --

THE COURT: Yeah, pause, please, Mr. Weintraub. If we were looking only at the face of the order that Mr. --

MR. WEINTRAUB: Steinberg?

THE COURT: No -- but I was thinking of somebody else, but it is Mr. Steinberg.

MR. WEINTRAUB: That's (indiscernible), Your Honor.

THE COURT: But Mr. Steinberg is trying to enforce. Mr. Steinberg wins. Your point and Mr. Weisfelner's point, and I suspect it will be Mr. Esserman's point, is that I can't limit the analysis to what the sale order says, that it may be the start, but it's not the end of the discussion. So then, I have to see, at least focus on the extent to which Mr. Steinberg should lose not the

standing -- what his sale order says, and then the issue is, not so much a matter of constitutional law, but Federal civil procedure and its bankruptcy procedure counterpart, as to whether the second phase of that enquiry, blowing away the order, requires attention to 60(b), and its bankruptcy cousin, 9024. So, I'm not persuaded that your failure to invoke 60(b), or Mr. Weisfelner's or Mr. Esserman's, is conclusive. What Mr. Steinberg is saying in substance is, "Hey, you guys, once you're asking me to look at the pha -- asking the Judge to look at the phase II part of the inquiry, you've got to turn to 60(b) doctrine." Help me with that.

MR. WEINTRAUB: Sure. Let me start with the first thing you said, which, if you apply the terms of the sale order, we lose. The sale order was based on an incomplete, deficient record. You can't look at the sale order, you can't look at the findings that were made in July of 2009 and ignore what was going on and not disclosed to the Court from 2002 to 2009. You just can't. The DeLuca report tells you that there was a whole lot of stuff that you didn't know, that may have changed your mind in July of 2009. So, saying that the order should be applied in accordance with its terms without regard to all of the undisclosed information really, to me, Your Honor, doesn't make sense and it's not equitable. And in terms of Rule 60(b), we are

not required to pursue a particular remedy. The remedy that we have pursued is the remedy that the Second Circuit has given to us in Manville, and the remedy in Manville, didn't require Rule 60(b). It didn't require a Rule 60(b) analysis, it didn't require a showing of prejudice. It just said, "If you didn't get constitutionally sufficient notice of the order. You're not bound by the order."

THE COURT: Well, let's talk about that --

MR. WEINTRAUB: If I could just --

THE COURT: Pause for a second. It didn't say whether or not you had prejudice, but Chubb in that situation was plainly prejudiced. That was a no-brainer, wasn't it?

MR. WEINTRAUB: And Your Honor, I know you're going to disagree with me, I was plainly prejudiced too, because but for that successor liability shield, I had a successor liability claim that I could have asserted against new GM. Maybe I would win, maybe I would lose. Mr. Steinberg says there is no merit to those claims because he's focusing on mere continuation. There are other theories of successor liability, including product line cases which would apply to my clients because they were injured, and there is a fraud exemption, and there are all kinds of penumbras to fraud, and one of the penumbras may be the non-disclosure of the ignition switch defect for seven

years, so it's putting the cart before the horse to say I'd lose on successor liability. My point is that I was never given the chance to, number one, oppose the successor liability shield at a time when my opposition would have mattered, before the transaction closed, and I was -- and because of the sale order, I am now precluded from ever bringing that successor liability claim. So what I lost, as you said earlier, was a collateral source. And we were talking about the successor liability cases being -- and Amaro in particular, which I can get to in a minute. When you were talking about Amaro, you said you disagreed with the underlying premise that those claims belong to the Debtor, and in fact, probably did belong to the individual claimants. When this sale closed, I would have had a successor liability claim, but for that shield. And another important point, because this is kind of stream-of-consciousness at this point, when you get to Section 363(m), what Section 363(m) -- and I know this is not appeal, but Mr. Steinberg argued the policy of 363(m). When you get to Section 363(m), Section 363(m) does not bar appeals. What Section 363(m) says is, reversal or modification on appeal does not affect the validity of a sale. What happened in this sale was much more than the mere transfer of title. This sale had another very shiny Christmas tree ornament sitting on it, and that Christmas tree ornament was the

successor liability shield. So, even if this was an appeal and a Section 363(m) situation, I don't think anybody is arguing that no matter what you throw into a sale order, it can't be reversed on appeal. The language of 363(m) itself anticipates a reversal or modification on appeal, because it says a reversal or modification on appeal does not upset the validity of the sale. So, my point is, Your Honor, that there are lots of things that happen in a sale that are not part of the transfer of title. I don't disagree that it was not a condition set up by the Treasury that it be free and -- that the sale be free and clear of successor liability, but you can't trump someone's due process rights by putting conditions into a contract by making the agreement convoluted, by saying that it's too expensive to give 70 million people first class mail notice. From our perspective, they could have done a lot of things to give us notice. Even though we were known Creditors and entitled to first class mail notice, publication notice, which identified the nature of the defect and the effect of the successor liability shield on injured people would have been sufficient, we think, and that's the difference between what happened in the Waterman case, because in Waterman, what the Court held was that people who had not yet exhibited symptoms could not be bound by a sale -- published sale notice that didn't even mention asbestos. What this Court

did in Chemtura in order to bind people who had not yet developed symptoms but had been exposed to the chemical was, this Court required very targeted notice that was explicit -- -

THE COURT: Yeah, but as you know, when you're talking about this Court, Mr. Weintraub, that wasn't just the Southern District of New York, that was Gerber.

MR. WEINTRAUB: Well, that's what I meant by this Court, Your Honor.

THE COURT: And if a Judge tries to implement what some, in other environs, call best practices, that doesn't necessarily provide the yardstick by which constitutional due process is measured.

MR. WEINTRAUB: Your Honor --

THE COURT: Now, Chemtura was a reorganized Debtor case and was also an objection to claim case, and I wonder, for those reasons, whether what I thought was a good idea in Chemtura, and I later learned that my good idea was good enough to measure what was satisfactory due process provides the yard stick.

MR. WEINTRAUB: So did Judge Furman, Your Honor.

THE COURT: I'm sorry?

MR. WEINTRAUB: So did Judge Furman.

THE COURT: Yeah, I think he was the guy who referred me on it.

MR. WEINTRAUB: He did. He liked what you did.

THE COURT: Okay. But how much does that help us here?

MR. WEINTRAUB: I think it helps us here, Your Honor, because it informs a kind of notice that we think should have been given, either by first class mail or by publication notice, and you know, we're knocking ourselves out with hypotheticals. Let me give you a hypothetical. What if --

THE COURT: Time out. You can ask yourself the hypothetical, but part of the rules that we go under is that you can't give me a hypothetical.

MR. WEINTRAUB: Okay. I'll give myself a hypothetical.

THE COURT: Okay.

MR. WEINTRAUB: If I were the Judge in the General Motors case and GM had filed a notice of sale with me, and a motion to approve the form and content of notice and said, "Oh, by the way, we've got this little ignition defect -- switch defect problem. We've been working on it for seven years. 30, 40 people have been killed, been a bunch of accidents, we want to sell free and clear of that and we want to bar successor liability claims. We don't want to say in our sale notice there's an ignition switch defect that causes unexpected stalling and loss of power steering

and power breaks and airbag disengagement. That's just too much information. You know, those four or five sentences, that could add maybe $1000 dollars to our mailing. So Your Honor, Mr. Weintraub, Judge Weintraub, would you approve this form of notice as being good and sufficient, even though we don't mention the ignition switch defect?" I don't think I would have done that, Your Honor. But unfortunately, I think that's the equivalent of what happened here. We think that's a violation of due process, and we think it's unfair. Can I address Amaro for a moment?

THE COURT: Oh, sure.

MR. WEINTRAUB: Unless you have other questions for me. I was thrown off by --

THE COURT: No, that -- I -- I think, based on what I said before, if we're talking about the same case, you may be ahead on it, but if you want to talk about it, go ahead.

MR. WEINTRAUB: Well, the only point I want to make on Amaro, because if I'm ahead, I should quit, but the only point I want to make on Amaro is Amaro and the other two cases cited in particular, I think it was the -- in the Alper case, which was Judge Lifland and Judge Bernstein's case, which was --

MAN: Keene.

MR. WEINTRAUB: Keene. In all three of those

cases, the activity that was being complained of in Keene and in Alper, was really inappropriate transactions between corporate -- related corporate companies that related to looting and in Amaro, it was a pre-bankruptcy sale that was going to be challenged as a fraudulent transfer for inadequate price. All three of those Courts said, on the filing date, those claims already existed, and therefore, they became property of the Estate. I don't agree that those claims should have become property of the Estate, but the rationale of those cases were, the cause of action existed on the filing date, and therefore, they became property of the Estate. That's not what happened here, as Mr. Steinberg pointed out, because the sale happened -- it was a sale done by the Debtor in possession post-bankruptcy. So, you don't have these claims ever becoming property of the Estate. The other very important point to make is, Judge Bernstein was the Judge in Keene, and he was also the Judge in Grumman/Olsen. And in Grumman/Olsen --

THE COURT: And in Burton.

MR. WEINTRAUB: And in Burton, which Mr. Weisfelner handled, ably so, I won't go back to that. When confronted with the successor liability issue in Grumman/Olsen, Judge Bernstein did not say, "Oh, remember what I did in the Keene case? That was property of the Estate, so that was released when I did the sale." He

didn't do that. What he did was the same analysis that Your Honor did in this case. He relied on Chrysler and he relied on TWA, and said that these claims are in personam claims and they can be solved free and clear of, in Section 363(f). I know this Court is probably not going to go there, but there's nothing in the record that said back in July of 2009 that there was a 9019 motion to settle a successful liability claim. That was not something that was stated on the record, which would, of course, be another potential due process violation if the result was going to be, "Oh, those were released back in 2009 because they belong to the Debtor." Unless you've got questions for me, Your Honor, I think I have about exhausted what was in my outline when I left the house this morning.

THE COURT: Okay, very good. Mr. Esserman?

MR. WEINTRAUB: Thank you.

MR. ESSERMAN: Sandy Esserman. Your Honor, I realize that time is running short, so I'm just going to hit a couple of hot points, if that's okay.

THE COURT: Sure.

MR. ESSERMAN: One thing that we have to be cognizant of here is that we're not just looking at retained liabilities versus assumed liabilities. We also have to remember that we're also talking about new liabilities, and new liabilities of new GM, and why is that important?

THE COURT: I understand instantly why that's important. I think it would be helpful if you would explain to me what kinds of claims you think are in that category.

MR. ESSERMAN: Well, we think a lot of the complaints talk about new GM's liability as new GM, not as an ignition switch. Let me give you some examples and some counts, and how the factual allegations are weaved into those complaints, because the complaints definitely talk about, in substantial portion, new GM's post-sale conduct. That is, the claims that would arise, for which people could not file proof of claim, for which they had no liability, old GM may have no liability. For instance there is a -- assertion of a violation of Deceptive Trade and Consumer Protection statutes. Some examples of the conduct forming the basis of these claims include the fact that new GM touted its commitment to safety, product quality, putting customers first, purporting to be a company that was focused on the consumer and pushing accountability deeper into the organization. The factual allegations go further that GM knew about the defects plaguing the GM-branded vehicles. They failed to take action, thereby causing consumers to associate the GM brand with safety and reliability, and causing Plaintiffs to overpay for or retain unsafe GM-branded vehicles. The relevation of new GM's extensive deceptions tarnished the brand further. There have been

complaints brought by the Orange County DA, the Arizona Attorney General, which are a similar basis to these complaints. There's also complaints for fraudulent concealment, which talks about independent, new GM violation of its independent duties, not old GM. Not those facts at all. They allege that new GM concealed and suppressed material facts about the quality of its vehicle and the GM brand. The company's systematic devaluation of safety issues, the ignition switch defect, many other defects plaguing GM-branded vehicles. The consolidated complaints also allege that new GM's duty to disclose orders from new GM's superior, if not exclusive knowledge of the many serious defects, and that it valued cost-cutting over safety, took steps to insure its employees did not reveal known safety defects to regulators or customers, and it goes on from there.

There's one other count to highlight, and that's sort of the unjust enrichment claim, also all based on new GM's conduct, not conduct that occurred in 2009, before the sale order or whatever, and how new GM benefitted from its failure to make timely disclosure of the initial switch defect in old GM cars as it is required to do. Plaintiffs therefore overpaid, they suffered increased insurance premiums, cost for alternative transportation, a few more facts. New GM benefit was unjustly retained in light of the

fact that new GM was only able to reap this through a campaign of deception, et cetera, et cetera. So, all of this conduct occurred post-sale, and that is what is being sought in the complaints, and that is what Your Honor is sort of being asked --

THE COURT: Occurred post-sale, but dealing with the value of vehicles manufactured by old GM.

MR. ESSERMAN: In part yes, in part no. There's some of the -- there is a portion of the complaint that deals with new GM vehicles, so --

THE COURT: Well, that, of course, is the much easier part, Mr. Esserman.

MR. ESSERMAN: Of course.

THE COURT: Now, in the complaint, and I must say that I've read everybody's briefs and cases more carefully than I looked at that complaint. Does it slice and dice? Does it set forth in different claims which involve old GM vehicles and which involve new, or is that a task that's imposed on me or Judge Furman or somebody, once I lay out the rules to try to figure out whether it's prescribed by such portions of the sale order that I'm prepared to keep enforcing?

MR. ESSERMAN: I think it lays it out, and I think you'll be able to imprint your order onto the complaint and see. Of course, we think all of it will survive, but if you

--

THE COURT: Yeah, well, don't rule out the possibility that any final opinion might not agree with both sides in full.

MR. ESSERMAN: Well, and I understand that. You know, which sort of also brings me to the order, and I know what Your Honor -- well, I don't know anything, but what I perceive is, to use Mr. Weintraub's analogy, if it was Judge Esserman, I'd be struggling with how to reconcile some of these provisions, how to reconcile the order, how to reconcile the rights of people. And one section of the order that has been overlooked, and I'm just going to suggest it's worth some thought anyway, is that in the sale decision on page 17 --

THE COURT: Of the slip opinion or -- but not in the published opinion?

MR. ESSERMAN: Yeah, it's --

THE COURT: Well, I mean by published, I mean the way it appears in the BR?

MR. ESSERMAN: You know, I don't have the BR site here. It's the decision on Debtor's motion for approval of its sale of assets to Vehicle Acquisition Holdings, LLC, assumption and assignment of related executory contracts, and entry into the UAW retiree settlement.

THE COURT: Yeah, we're talking about the same

opinion.

MR. ESSERMAN: Yeah, it's --

THE COURT: All I'm talking about is the way it appears on ECF, you're saying, rather than in the BR.

MR. ESSERMAN: Yes.

THE COURT: Okay.

MR. ESSERMAN: And these are the findings of fact in your decisions, which I'm going to quote to you, and they're adopted in the sale order, which, of course, takes precedence, but there's one statement in there, and when you're wrestling with this, you can wrestle with this, what you meant by this, that "Old GM will retain all liabilities, except those defined in the MPA as assumed liabilities." The assumed liabilities, that is, what new GM's going to take, include, and I'm quoting, "product liability claims arising out of products delivered at, or after the sale transaction closes, paren the closing, close paren, and two, the warranty and recall obligations of both old GM and new GM." And I just sort of throw that out for something to be massaged, I guess, but perhaps the sale order isn't all so one-sided as new GM might have you believe, and perhaps it -- I'm not sure what exactly was meant by that because there are other, more specific issues dealing with those findings, but that is a finding of this Court, which was adopted in the sale order, which takes precedence. So, there may be

some room in there to manipulate something, should Your Honor decide to do so, on the basis of the order --

THE COURT: Well, you don't exactly mean manipulate it, as much as you mean, as to draw conclusions from.

MR. ESSERMAN: Exactly. I withdraw that word.

THE COURT: Okay.

MR. ESSERMAN: And I probably already exceeded my time, thank you.

THE COURT: All right, thank you very much. All right, folks. Can you get in and out? Oh, Mr. Flaxer?

MR. FLAXER: Hi, Judge.

THE COURT: Okay, come on up, please. I thought your principal concern was on (indiscernible) on the Court, though.

MR. FLAXER: Yes, Your Honor, but your order stated that that issue would not be addressed, which was fine, but if we wanted to address, I would dispute it. I will dispute the --

THE COURT: Okay, I'll just rely on your good faith. Go ahead.

MR. FLAXER: Yes, Your Honor. I just wanted to, very briefly, focusing particularly on the remedy issues. We continue to believe that some discovery, as highlighted by our disputed facts and our prior pleadings before the

Court may still be appropriate. We think that Your Honor's determination on a remedy issue is inherently an equitable decision. We also think, in this respect, that it's likely that discovery would reveal, and I'll mention two primary factual areas: one is actual knowledge of the ignition switch defect at very high levels of GM's management, the other is that GM deceived NHTSA in connection with its responses to the so-called "death inquiries". We think that if the Court had that factual record developed, as opposed to, and what I still agree with designated counsel is a very strong factual record based primarily on the DeLuca report, but, as we've highlighted, the DeLuca report only goes so far, and it seems to us, consciously avoids going after the next level of senior level management knowledge. We think if you had those facts before you, it would weigh very heavily in favor of granting a remedy sought by designated counsel for reasons including deterrence of future concealments in connection with 363 sales.

THE COURT: And by that knowledge that you talked about in the last sentence, you're talking about knowledge by old GM management more senior than the 24 or 25 people who were the subject of this (indiscernible)?

MR. FLAXER: Yes, Your Honor.

THE COURT: Okay.

MR. FLAXER: For example, we think it's likely --

we think it's very likely that the knowledge would go up to the level of general counsel of North America and perhaps higher, but you know, obviously that would take some discovery to establish that, and we understand the concern about delay, but in our estimation, in balancing the -- how crucial it is that the remedy sought by designated counsel be granted, that perhaps what Your Honor could do is rule in favor of our side of the table on the due process issue and authorize some discovery so Your Honor has a full, factual record in order to make a fully informed decision, bearing in mind that this is an equitable determination about remedy, that Your Honor have a fully developed factual record.

THE COURT: All right, thank you.

MR. FLAXER: Thank you, Your Honor.

THE COURT: Okay. By yelling out from the audience, I guess, can you guys get back in an hour, or do you need more time?

MAN: An hour would work.

MAN 2: An hour is fine with us, Your Honor.

THE COURT: Okay, then I show five after one on my watch, it's a minute or two after that on that big clock on the wall, see you guys back here in an hour.

MR. STEINBERG: Your Honor, I assume that when we come back, it's the GUC Trust that will start?

THE COURT: I assume you're going to reply next, or --

MR. STEINBERG: The GUC Trust hasn't spoken yet. I'm not --

THE COURT: Oh, yeah. Is GUC Trust going to be -- Ms. Rubin, are you going to be weighing in on what I've heard this morning?

MS. RUBIN: I fully expect to, Your Honor.

THE COURT: Okay. Then Ms. Rubin next, and then you can reply after that, Mr. Steinberg. Now, especially with the extent to which I've interrupted you guys, I'm not going to prevent you from arguing anything, even if it's beyond the original time limits, assuming you're not filibustering or otherwise taxing my patience, but we still have to quit at 3:15 today. If we're not done at that point -- and of course, the resumption is going to be at 2:05, if we're not done, then we're going to have to pick up tomorrow morning. We're in recess.

MR. STEINBERG: Thanks.

(Court in recess at 1:05 PM)

THE CLERK: All rise.

THE COURT: Have seats, please. Okay, are we up to Ms. Rubin?

MS. RUBIN: We are, Your Honor, and if I can help it, I don't intend to take the full balance of my time

today.

THE COURT: Okay.

MS. RUBIN: But I do want to address a number of the issues that you talked about with others today, and hope that I can address some of the questions that you posed to all of us as a group, as well.

THE COURT: Okay.

MS. RUBIN: Your Honor, I want to start from the proposition that you started from this morning, which is that you have been convinced, or at least you assume, where we are right now, that there was enough knowledge at old GM to have warranted a recall in 2009, prior to the sale. Your Honor is clearly aware that the briefing that my client and the participating unit holder submitted, took a different tack, and the reason that we did that is because we wanted to illustrate that even if everything that Mr. Steinberg and his colleagues said was true, there was still a due process violation here, or would be a due process violation here, with respect to the groups of Plaintiffs that Mr. Weisfelner, Mr. Esserman and Mr. Weintraub represent.

That having been said, let's start from the proposition that Your Honor began with this morning and move from there. The first, and most important reason we believe that that the Plaintiff should be able to proceed against new GM is because, as Mr. Weisfelner and others capably told

you, they have independent claims in both the pre-sale and the post-sale complaint against new GM, that are predicated on conduct of new GM, and for some reason, in their reply, new GM seems to suggest that that's not true of the pre-sale complaint, and I just want to illustrate one example of why that is, in fact, the case. In paragraphs 1063 to 1079 of the pre-sale complaint, the pre-sale Plaintiffs make a claim under California's Unfair Competition law, and that claim is predicated, in part but not in full, on the violation of GM, sorry, new GM, on their violation to comply with the Safety Act, and Your Honor, I want to underscore that that was a knowing violation, by consenting to the order with NITSA. What new GM essentially acknowledged is that they didn't comply with that law, they did not provide NITSA with knowledge within five days of determining there needed to be a recall.

And from what I understand, Mr. Weisfelner's clients' claim, for violation of the Unfair Competition law, could be predicated on that in and of itself alone. Now, there's another reason that these claims -- we discussed whether or not these independent claims against new GM are subject to the sale order, and Mr. Esserman pointed out to you this morning a reason why they are not, based on the findings of fact in the sale decision, and their incorporation in full into the sale order.

Let me suggest to you another reason why, that I think has eluded our discussion so far, and I'll refer Your Honor to Section 2.3(b) of the Master Sale and Purchase Agreement. That is the definition of retained liabilities, and I'll just read it, in part. The definition of retained liabilities starts with, "each seller acknowledges and agrees that, pursuant to the terms and provisions of this agreement, Purchaser shall not assume or become liable to pay, perform or discharge, any liability of any Seller," and let me pause there, Your Honor, because when we're talking about retained liabilities, it pertains to the liability of a Seller. Now, Mr. Steinberg wants to suggest that any liabilities that have to do with private rights of action for failures, for example, to comply with recall obligations, are not assumed liabilities, and therefore, by definition, must be retained. Respectfully, I'll disagree, and agree with the Plaintiffs that it's not a binary universe of assumed, retained and nothing else. New GM covenanted, under Section 6.15(a), that it would comply with all of the Federal recall-related laws and regulations applicable to old GM-manufactured, designed or sold vehicles.

THE COURT: That's in the sale agreement?

MS. RUBIN: That is in the sale agreement, Your Honor.

THE COURT: What section is that, by the way?

MS. RUBIN: It's 6.15(a) and it's addressed in our briefing as well, Your Honor.

THE COURT: I'm well aware of the point, I would just -- wanted to see the citation, too.

MS. RUBIN: So, Your Honor, it would be our position that, having undertaken that covenant, that is the independent duty that Mr. Steinberg insists that his client does not have, irrespective of the wording of the sale order, they agreed to comply with those recall laws in respect of old vehicles. Whether or not the sale order goes beyond that in other respects, and maybe goes too far, is another issue entirely, but at least in terms of the sale agreement itself, the retained liabilities are liabilities of any Seller. I don't hear anybody suggesting, or they shouldn't suggest, that old GM, or the old GM bankrupt estate through the GUC Trust, should somehow be liable for the knowingness conduct of new GM and its failure to disclose to NITSA, disclose to the driving public, to disclose to this Court, and to disclose to anyone at all, that these cars were subject to a safety defect that rose to the level that it warranted a recall.

The other thing that -- one other thing that we would say, Your Honor, is, in terms of why the Plaintiff's claims should be allowed to go forward, let me identify

another group of the Plaintiffs. I believe Mr. Weisfelner is the one who spoke to you at length about the used car purchasers here, and whether or not their claims are subject to the sale order. It's hard for us to see, under the Grumman case, which as Your Honor knows, interprets Chateaugay, how the used car purchasers here could ever have been subject to the sale order and injunction. None of those people had any pre-sale relationship or contact with old GM. Suddenly, they were not aware at the point in time of their sale that their cars were subject to the serious safety defect of which we're all now aware, and it's hard for us to see how the analysis in the Grumman case is any different than that which should be applied to used car purchasers, who are a class of Plaintiffs implicated by the post-sale consolidated complaint.

Now, there was some discussion this morning about the Burton decision, which Your Honor referred to as the Chrysler decision by Judge Bernstein, and to the extent that Your Honor has questions about why these used car purchasers in this situation should be treated any differently than the Burton Plaintiffs, let me try to address that, if I may.

First and foremost, the Burton case involved a recurring fuel spit-back problem that had already resulted in two to three recalls prior to Plaintiffs bringing forth claims in that instance. Here, we have a warranty in the

sale agreement by old GM, that there had been no material recalls since 2007. We're not dealing with a factual situation in which anybody who drove one of the vehicles, we'll call them the subject vehicles, that are the subject of this proceeding, nobody is suggesting that drivers should have been on notice of the ignition switch defect by virtue of anything that happened before, as was the case in Burton.

Now, new GM is very fond of quoting to Your Honor a particular sentence from the Burton decision in which Judge Bernstein, and I'm sure I'll mangle this somehow, says that anyone who drives a car should reasonably contemplate that their car will need to be repaired. Again, the end of that sentence, which new GM doesn't quote for you is, "especially whereas here there have already been two to three recalls involving the same problem, and involving some of the same vehicles," but be that as it may, there's another distinction here that I think is a more fundamental and important one.

The claims at issue here are not fundamentally about repairs. The Burton case is one in which the Plaintiffs, who characterized themselves as future claimants and with which Judge Bernstein disagreed, their claims were Duty to Warn claims and failures to honor warranties. Fundamentally, they were upset that their cars weren't being repaired. That's not really the gravamen of the Plaintiff's

complaints and the consolidated complaints here. What are they really talking about, Your Honor? They're saying, there has been such a widespread erosion of GM's reputation for quality, such that all of their vehicles have suffered economic loss, and to the extent that they are also alleging damages for economic losses associated with repairs, again, I would submit that those are not the sort of repair-related claims that a driver of these vehicles could have or should have anticipated. They are claims for things like childcare expenses associated with all of the time necessary to get their cars repaired, their lost wages, their rental car expenses. Your Honor is well aware that there are a number of people who said, "Until GM is able to repair my car consistent with the ignition switch recall, I'm not driving that car, because I know, based on the information that's come out through Feinberg Compensation Fund, that GM has at least admitted that 50+ people died, and has awarded awards under the Feinberg Compensation protocol, to at least 128 people." That being the case, there are people that Mr. Weisfelner and Mr. Esserman represent who say, "I'm not going to drive my car and GM should be liable for the cost of my rental car expenses during that period of time, until my car is 100 percent safe to drive."

Now, Your Honor, putting aside the question of whether these Plaintiffs have independent claims against new

GM, or whether there are future claims on behalf of the used car purchasers that are more akin to the claims in the Grumman/Olsen case, the biggest issue here is obviously whether or not the pre-sale economic loss Plaintiffs suffered a due process violation. And you see in the briefing that there are starkly different visions of the notice that should have been afforded to those claimants.

Let me submit this. If Your Honor can accept that old GM knew enough that they should have recalled the subject vehicles, the notice that was given was never enough, even for the folks that Mr. Weintraub represents, and here's why. Last year, in the DPWN case that went up to the Second Circuit, the Court set forth the standard for evaluating the claims of those who otherwise would be barred by a bankruptcy order. And the Court essentially said, it's a two-part test. The first thing you have to do is look at what the claimants knew or should have known with reasonable diligence, and if the claimant gets across that threshold, the second part of the inquiry is to ask what "the Debtor knew or should have known of the potential liability, such that it should have provided the claimant with notice of his or her potential claim."

Whether or not the folks that Mr. Weisfelner and Mr. Esserman and Mr. Weintraub represent are known Creditors, it is indisputable that old GM knew enough that

it should have afforded them more notice under the DPWN test. And Your Honor shouldn't take my word for the fact that the DPWN test now guides evaluations of due process not just in a post-discharge context, but across all bankruptcy contexts, Your Honor may be aware that Judge Gropper issued an opinion in the Direct Access bankruptcy last month on January 6th, the Westlaw site is 2015 WL 94556, and in doing so, Judge Gropper was asked to pass on whether or not a claimant could file a late Proof of Claim after a confirmation order. Judge Gropper writes as follows, Your Honor: "In DPWN holdings, the Second Circuit recently set forth the showing that a party must make, in order to obtain the right to pursue a claim that otherwise would be barred by virtue of a Debtor's bankruptcy" It wasn't conditioned on what kind of case we were talking about or what stage in the bankruptcy we were at. Judge Gropper interpreted the DPWN case to be the guiding analysis for any time someone comes before this Court or a District Court and says, "I have a claim," and the Defendant says, "No, no, no, you're barred by a sale order and an injunction," or, "You're barred by some other order in bankruptcy."

So under that analysis, Your Honor, the DPWN analysis, we would respectfully submit that old GM knew or should have known of the potential claims that folks like Mr. Weisfelner's clients would have had, even if they didn't

have a bunch of lawsuits before them, even if they didn't make the list of Creditors, even if they didn't appear on the general ledger. The had sufficient knowledge within the company, based on their books and records, construed more broadly, that they should have provided notice of the potential liability before the sale.

Now, Your Honor asked an inform question earlier today, which was, "What should that notice have looked like?" And I think you've heard from Mr. Weintraub and others about what that might have looked like. Let me underscore Mr. Weintraub's presentation and say, we believe that the right notice here would have looked like the Chemtura situation, and respectfully, while Your Honor identifies that as a situation in which Your Honor approved best practices, and certainly, I'll agree that Judge Furman in affirming that, agreed that maybe that wasn't what was constitutionally mandated under the facts of that case, I think the type of notice provided there is constitutionally mandated in this case. You have a situation where on the factual record, Mr. Weisfelner has already convinced Your Honor that old GM knew enough that it should have issued a recall in respect of the subject vehicles. On those facts, why it's not the case that the publication notice should have said, "There is a safety defect of a serious dimension in these makes and models of vehicles, and if you believe

you have been injured by that, now is the time to come forward. There will be a hearing about the sale." That is essentially what was provided in the Chemtura case where the manufacturer understood that a chemical that it produced --

THE COURT: Chemtura was a claims case, that the people worked in factories where diacetyl was used.

MS. RUBIN: Yes, Your Honor.

THE COURT: It wasn't a 363 case.

MS. RUBIN: Well, that's true, Your Honor, it wasn't a 363 case, but respectfully, Your Honor, courts in this District and Circuit and others, borrow, with respect to what notice is constitutionally mandated, from context to context all the time.

THE COURT: Yes, but you would agree, I take it that, Mullaney talks baby talk about the need to look at the facts and circumstances.

MS. RUBIN: Sure, and Your Honor, I'd also agree that the facts --

THE COURT: As do the other cases, the Second Circuit cases such as Drexel Burnham implementing the Mullaney.

MS. RUBIN: Sure, but Your Honor, I would also say, that in talking about 363 cases or otherwise, the fundamentals of notice, the cornerstones of notice, or not only notice of one's claim, but the opportunity to be heard,

and that doesn't change from context to context, and if we are going to follow the dictates of Mullaney and talk about the facts and circumstances of this case, I think if Your Honor is willing to find that old GM knew enough that it should have recalled the vehicles, certainly it knew enough in those circumstances that it should have incorporated in a publication notice, enough information to put people like Mr. Weisfelner's clients, that if they believed they had a claim, now was the time to come forward. They didn't have to necessarily say, "If you believe you've suffered an economic loss or diminution of value in your car or lost wages," or any of that, that's not the claim-specific notice that we're talking about. But they should have apprised people in the Plaintiffs' position of the facts and circumstances that underlie their case, that there was a serious ignition switch defect that ran throughout the subject vehicles, that was serious enough to warrant a recall, and therefore, anyone who believes that they have been injured thereby, should come forth and file a claim.

Now, Your Honor, there has been a lot made out of the fact that 363 is sort of a separate situation, and I think Your Honor just alluded to it, that in discharge cases or confirmation cases, maybe notice doesn't mean what it should mean in a 363 case. But I'll have your -- I'll say for Your Honor's sake, DPWN, at the District Court level,

which was a known Creditor case, right, DHL didn't know that it has an antitrust claim against United Airlines. They certainly knew that they were a Creditor, they were certainly apprised of the bankruptcy, and deciding what notice is due to DHL, what did the Eastern District -- how did the Eastern District make that decision? Well, they borrowed from the Grumman case, which is, in fact, a 363 case.

Similarly, in the Schwinn case in the Northern District of Illinois, a 363 case involving a purchaser of an exercise bike in 1979, whose grandson is not injured until well after the bankruptcy in the 90s, what does that case do? It borrows from the Chemtron case in the Third Circuit, which again, is a discharge case. So, I would submit to Your Honor that what is fundamentally required for notice before depriving someone of a property interest, the facts and circumstances of the cases might change in terms of dictating what form of notice is required, but the content has to be informed by a larger body of case law that is transferrable from one context to the other.

It's also true that the idea that none of the Plaintiff's property interests here were affected is sort of a preposterous one, right? And to the extent that new GM tries to distinguish some of the 363 cases outside this Circuit by saying, "Well, those cases involve property

interests that were unique and couldn't have been reduced to money," that's actually not true. First of all, those cases were all decided on grounds other than the type of interest invoked, and Rule 60(b) was considered in all of them.

I'll talk about the poly --

THE COURT: Wait, time out. You said 60(b) was considered?

MS. RUBIN: It was considered, and in each of those cases, Polycel, Metzger, and Compak, after referring to Rule 60(b), each of the courts nonetheless held that the claimant before it should be exempt from the sale order, on the basis that the due process rights were violated. I'll quote to you, Your Honor from the Metzger case, where, after considering Rule 60(b), for example, the Court said, "The Court has some flexibility in creating a remedy here, and need not and will not find the entire sale void." But nonetheless, the Court held that it would find that the sale was void as to the claimant before it.

THE COURT: Well, there was no question that Arthur Weissbrodt said that, but I don't have a memory of him discussing the criteria for granting 60(b) relief, and if you say that he mentioned it, and I'm not (indiscernible) to Ms. Rubin, but there was not a material discussion of 60(b), was there?

MS. RUBIN: Your Honor, I don't have the case

right in front of me and I'm unable to answer that question directly, but my recollection is that in at least two of these three cases, there is a discussion by the Defendant that 60(b) only allows for voiding the entire sale order or providing no relief, and in each of those cases, there's a rejection, either implicitly or explicitly, of that theory. So, for example, in the Compaq case -- you know, the other thing I would say, Your Honor, is that certain of these Courts say that notwithstanding Rule 60(b), Rule 60(b) is only one way of getting there. So, for example, in the Compaq case, the Court says, "There's not a Rule 60(b) motion before me, but sua sponte, I can characterize the relief that this claimant is asking for as a 60(b) motion, or alternatively, I can see this as a motion for relief from the sale order." That's an implicit recognition that 60(b) is not the only vehicle by which you can remediate a due process violation. So, respectfully, GM's assertion that the Plaintiffs here have to conform and shoehorn their arguments into a 60(b) analysis in order to prevail is simply not the case. You have an implicit recognition in the Compaq case that that's true, and more importantly, in this District, let me refer Your Honor to the Lehman Brothers decision that new GM cites in its brief at 2014 WL 7229473. Now, Judge Buchwald in that situation determined that the Creditor, who was making arguments before her, in

fact didn't qualify as a Creditor at all, but in clarifying the narrowness of her holdings, she said as follows, Your Honor: "We do not decide to question whether a person with a cognizable property interest may attack a final free and clear sale order in the absence of notice," and then, following that immediately with this sentence: "Nor do we decide whether the lack of notice could be grounds…" there is an ellipses here, "for relief from a sale order under Rule 60(b)." So, you have a District Court Judge in this District, implicitly recognizing that a due process claim, meaning, I didn't get notice of the way in which my property interests would be affected here, could be different from a Rule 60(b) motion.

THE COURT: I'm not sure if I heard you right. I thought you preceded each of those two sentences by "We do not decide that."

MS. RUBIN: And I did, Your Honor, but I still see the case as standing for a recognition, as a District Court Judge in this District, recognizing that these are two alternative ways of getting to the same place. I'll recognize that that's dicta. Judge Buchwald didn't reach those issues in her decision, and she's very clear about that, but notwithstanding that, in clarifying to the larger community reading her decision what she is and is not deciding, she is saying expressly, "I see these things as

possibly two different avenues for relief," and I think it just underscores the fact that in the Compaq decision, for example, the Court says the same thing. "I don't have a Rule 60(b) motion before me. I can sua sponte interpret the arguments that are being made before me as a 60(b) motion, or alternatively, I can grant relief from the sale order." That doesn't sound to me like the musings of a Judge who believes that 60(b) is the only vehicle by which someone who has a due process argument can seek relief from the sale order.

Your Honor, I'll move on to talk about remedy, and I'll note that the primary cases on which new GM depends are the Edwards case, and they also place a lot of emphasis on the Paris case, which hasn't been discussed directly by name, but the general principle has been alluded to a lot here, that's the case --

THE COURT: Paris?

MS. RUBIN: Yes.

THE COURT: Mr. Weisfelner had mentioned Paris.

MS. RUBIN: Well, I apologize to Mr. Weisfelner for not hearing that. To the extent that the Court in Paris is saying, "Your interests are not affected here because you have a bunch of assets that can be converted and all Creditors will have access to that." Your Honor, that may be fine and well if we were here four years ago, or five years

ago, but that's not where we are now, and I think to not appreciate the realities of where the GUC Trust finds itself would be a disservice to everyone, right? We have a situation here where the GUC Trust has distributed 90 plus percent of distributable assets. We are three plus years post-confirmation. All of the remaining resources of the GUC Trust have been reserved for express purposes as Your Honor knows, we filed a quarterly GUC Trust report last week. There is literally nothing left right now for the Plaintiffs here, and so to not -- if we're going to consider who would be prejudiced by a remedy here or consider a larger context of prejudice with respect to the remedy, I think that has to be considered, too.

The final thing that I'll say, Your Honor, is the notion that prejudice is somehow a required element of a due process violation is creative, but not sustained by the case law. To the extent that old GM siphoned numbers --

THE COURT: Time out. Before you go too far, Ms. Rubin --

MS. RUBIN: Sure.

THE COURT: -- I need to dust off with you the colloquy I had with Mr. Weisfelner, because I would agree in a heartbeat that you didn't make the supplemental distribution to your constituency last year in the dead of night, but you're saying -- you're talking about hardship,

presumably to the economic loss Plaintiffs, or maybe Mr. Weintraub's people or both. At the same time that your folks were the beneficiaries of Mr. Weisfelner's guys decision for admitted strategic reasons, not to try to tap those funds. So you're trying to exploit the very situation for which your guys were the beneficiary.

MS. RUBIN: I don't believe that it's an attempted exploitation at all, Your Honor.

THE COURT: Well, I'm not accusing you of evil --

MS. RUBIN: I respectfully disagree, if I can.

THE COURT: I'm accusing you of representing a client --

MS. RUBIN: No.

THE COURT: -- but isn't that the bottom line?

MS. RUBIN: No, Your Honor, it's not, and here's why. Your Honor engaged in a colloquy earlier with Mr. Weisfelner, well first of all, to the extent that you engaged in the colloquy earlier with Mr. Weisfelner also about the efficacy of the bar date notice, correct? It may be that the bar date notice was not effective as to certain of these Plaintiffs, but the sale notice wasn't effective as to them either, and they had a choice to make at the outset. It's undisputed that they didn't know about the defect in the subject vehicles until around February of 2014, but at that point in time, they made a choice, and they made a

choice to go after new GM. They never once filed a claim or sought to file a late proof of claim against the GUC Trust.

When there were the initial motions to enforce a few months later, and we came before this Court, the Plaintiffs filed an objection, they filed an adversary proceeding complaint, those issues were not raised there either, and when we first came before Your Honor, let's rehash how the GUC Trust came to be a party here. It wasn't on motion or any suggestion by the Plaintiffs. It was on suggestion by new GM, who said the Plaintiffs should be forced and shoehorned into going after the GUC Trust. But we don't believe that the Plaintiffs should have to do that. We believe that the Plaintiffs' due process rights were violated, and so in making that distribution, I wouldn't characterize it as an exploitation at all. I would say that my client was well within its rights to distribute assets to its existing beneficiaries, consistent with its fiduciary duties and the documents that govern it.

Your Honor, if I can return to prejudice?

THE COURT: Yeah, go ahead.

MS. RUBIN: The notion that prejudice is a required element of a due process violation here, I think, is a fiction, and in advancing that argument, new GM relies on two different strands of cases: one are cases in which, despite a notice defect, the claimants still have an

opportunity to be heard, and that's particularly true of the cases that they cite within this District. The Parker case, I think, is a paradigmatic example of that. The Plaintiff in that case came forward and said they were deprived of their due process rights, but Your Honor found that, notwithstanding that, the guy cross-examined two of the three witnesses during the sale hearing, received ample discovery. There was no due process violation because he had an opportunity to be heard. That certainly was not the case with respect to any of the Plaintiffs here, against whom the notice couldn't have possibly been effective, because to just get the notice without notice of their claim is, as Mr. Weisfelner recognized in the Waterman case, no different than being apprised of your claim and not being apprised of the bankruptcy.

The other cases that they cite are entirely far of field from bankruptcy altogether. Most of them involve procedural irregularities, like failure to enter a substitution of counsel order, and notwithstanding that, the new counsel still gets to be heard, or listing the wrong statute in an administrative proceeding on the cover, where everybody knows what's really at issue. That's certainly not the case in which we found ourselves, so it takes a lot of creativity to cleave onto the due process standard in this Circuit, some prejudice standard. The Manville case

and the Cope case that Your Honor referred to earlier, we understand and appreciate those aren't 363 cases. But to conclude, Your Honor, we would suggest that those should be your guiding principles. Those are recognitions by the Second Circuit that in a bankruptcy situation, no party can be deprived of a property interest without adequate notice of their claim.

Everybody understands, here, that that's not what happened, and to the extent that Your Honor is willing to find on this stipulated factual record, that old GM had sufficient knowledge that it should have recalled the vehicles, it should also be the case that they had sufficient knowledge to put into a publication notice, if not actual mailed notice to all of the people that Mr. Weisfelner and Mr. Esserman and Mr. Weintraub represent. It should have put into that notice greater content to afford people a better and more complete, and consistent with due process, a constitutional understanding of what their claims are. And with that, Your Honor, I'll rest.

THE COURT: All right, thank you. Okay, Mr. Steinberg?

MR. STEINBERG: Your Honor, do we have a stop at a quarter after three today?

THE COURT: Yes.

MR. STEINBERG: I'm not sure if I'll finish with

my reply, but I've spoken to the other counsel and I think they all want to reply as well too, and I'm wondering whether we should do all of our replies tomorrow morning. We could potentially do equitable mootness today, if you wanted to take it out of order if everybody else was prepared to do that, but I'm not sure whether I'll finish, and I don't necessarily think it's fair that they will have overnight to prepare for my replies.

THE COURT: Well, I certainly see the merit of your suggestion of having the remainder, this topic, done at the start tomorrow. How much equitable mootness is mainly between Ms. Rubin and you?

MR. STEINBERG: No, Your Honor, I think the entire equitable mootness argument is a half hour and I think I have five minutes, I think Mr. Weisfelner has five minutes --

THE COURT: Yeah, of course, it's mainly Ms. Rubin's issue.

MR. STEINBERG: Oh.

MS. NEWMAN: Actually, Your Honor, it's not, it's --

MR. STEINBERG: It's the unit holder.

THE COURT: Yes, but with Akin Gump.

MS. NEWMAN: Yes.

THE COURT: You're her ally.

MS. NEWMAN: I am. I (indiscernible).

THE COURT: Okay, you're playing the role of Mr. Golden?

MS. NEWMAN: Yes, Your Honor.

THE COURT: All right. Can we really, really get this done in 35 minutes?

MS. NEWMAN: Your Honor, I think we would prefer to start that tomorrow, keep the order that's contemplated in the schedule and start that tomorrow because we're concerned that, to the extent that Your Honor has questions, we may need more time.

THE COURT: Are you guys available early tomorrow as you were today?

MR. STEINBERG: Yes.

MS. NEWMAN: Yes.

THE COURT: All right, let's do this starting at 9:00am tomorrow.

MR. STEINBERG: Thank you.

MS. NEWMAN: Thank you, Your Honor.

THE COURT: But therefore, what I want to do is back to the principle arguments, which is what you (indiscernible), Mr. Steinberg, and Mr. Weisfelner, you're looking for a brief (indiscernible)?

MR. WEISFELNER: Correct, Your Honor.

MS. RUBIN: And Your Honor, I have also reserved

five minutes if Your Honor can (indiscernible) reserve (indiscernible).

THE COURT: Okay. In which case, the (indiscernible) Plaintiffs, of course, have to be limited to new stuff that Mr. Steinberg says tomorrow morning, but with that said, we'll pick up at 9:00 tomorrow. Let's notify the marshals accordingly. And CourtCall if you are listening in, get yourself down there before 9:00. Okay, we'll recess until 9:00.

MR. WEISFELNER: Your Honor, do you know whether or not it would be safe to leave our binders and --

THE COURT: I'll tell you what I always tell people in these circumstances, Mr. Weisfelner. You've got my permission to --

(Whereupon these proceedings were concluded at 2:44 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: February 19, 2015

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